Office-Supreme Court, U.S.
FILED
JUN 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2131

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Did the action of the California Public Utilities Commission, in entering a retroactive order granting the applicant a right of entry upon the property of appellant, without hearing, compensation or an opportunity to present evidence, and the action of the California Supreme Court in denying review, violate the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States?[1]

Do California statutes providing for review of decisions of the California Public Utilities Commission, as presently construed and followed by the California Supreme Court to permit arbitrary denial of review, violate the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings below. However, because of the nature of the case, as well as the somewhat unique and limited type of purported review available in California with respect to decisions and orders of the Public Utilities Commission, appellant believes it would be helpful to inform the Court of the capacity in which each of the parties participated in the proceedings below.

Appellant[2] herein was the respondent in the proceeding before the Public Utilities Commission of the State of California and the petitioner in the proceeding in the Supreme

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[1]It is submitted that such questions as whether a right of entry constitutes a property right are implicitly and fairly included within the statement of the question presented.

[2]Sometimes hereinafter referred to as "the railroad".

Court of the State of California. The California Public Utilities Commission[3] is the body which issued the orders as to which review was sought and was the designated respondent in the proceeding in the California Supreme Court. The City of Salinas[4] was the applicant in the proceeding before the Public Utilities Commission and the party which petitioned for and obtained a modification of the Commission's original decision by the addition of a retroactive ordering paragraph, without hearing, giving the City the right to immediately enter and begin construction upon the real property of the railroad. The City participated in the proceeding in the Supreme Court as the real party in interest and, as such, sought denial of the Petition for Writ of Review.

Appellant's parent Company is Southern Pacific Company. Partially owned subsidiaries and affiliates of the appellant, Southern Pacific Transportation Company, are St. Louis Southwestern Ry. Co., The Ogden Union Railway & Depot Co., Portland Traction Company, Portland Terminal Railroad Co., Sunset Railway Company, Central California Traction Company and Trailer Train Company. Wholly and partially-owned subsidiaries and affiliates of St. Louis Southwestern Ry. Co. are the Alton & Southern Ry. Co., Arkansas & Memphis Ry. Bridge & Terminal Co., Dallas Terminal Ry. & Union Depot Co., St. Louis Southwestern Ry. Co. of Texas, Southern Illinois & Missouri Bridge Co., Southwestern Transportation Co., Terminal R.R. Association of St. Louis, Glascar Inc., Main Street Warehouse Company, The Southwestern Town Lot Corp., Kansas City Terminal R.R. Assoc. of St. Louis and Trailer Train Company.

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[3]Sometimes hereinafter referred to as "the Commission".

[4]Sometimes hereinafter referred to as "the City".

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JURISDICTIONAL STATEMENT

Appellant, Southern Pacific Transportation Company, appeals from orders of the Supreme Court of the State of California denying, without hearing or opinion, a Petition for Writ of Review requesting it to determine the lawfulness of certain decisions and orders of the Public Utilities Commission of the State of California (Appendix A) and a subsequent Petition for Rehearing (Appendix B). Appellant submits its Jurisdictional Statement and respectfully requests that probable jurisdiction be noted.

OPINIONS BELOW

On March 18, 1980, the California Public Utilities Commission issued its Decision No. 91469, in *Application of the City of Salinas*, Application No. 59126. (Appendix C). On June 3, 1980, the Public Utilities Commission issued its Decision No. 91891 which, in part, denied an application for rehearing with respect to the Commission's apportionment of costs which had been timely filed by appellant. However, the Commission did not limit its Decision No. 91891 to a simple denial of rehearing but, in response to a petition for modification filed by the City as part of its answer to the application for rehearing, the Commission also modified its original decision by adding another ordering paragraph, without according appellant an opportunity to be heard, retroactively authorizing the City to enter and construct a grade separation upon the real property of the railroad. (Appendix D)

In order to preserve its right under California statutes to seek review by the California Supreme Court with respect to that portion of the Commission's Decision No. 91891 modifying its original decision by adding a new ordering paragraph giving the City a retroactive right to enter upon the railroad's real property to construct a grade separation, without giving the railroad an opportunity to be heard or awarding compensation, appellant railroad timely filed another application for rehearing with respect to that portion of the Commission's Decision No. 91891. On October 8, 1980, the Public Utilities Commission issued its Decision No. 92299 denying such application for re-

hearing. Although the Commission, once again, modified some of the language in its original decision without either granting a rehearing or reopening the matter for further hearing, it made no further modifications or additions to its ordering paragraphs. (Appendix E, pp. E-1-E-3, *infra.)*

Decisions Nos. 91469, 91891 and 92299 of the California Public Utilities Commission have not been reported in the official printed reports of the Commission at this time since such official printed reports are presently issued approximately three to four years after issuance of the decisions reported therein. In addition, although all decisions are cited therein and at least a summary description of the Commission's order is provided, not all decisions of the Commission are reported in full in its official reports. It is not known whether any of the Commission's decisions involved in this proceeding will be reported in full.

The railroad filed a timely Petition for Writ of Review with the California Supreme Court with respect to the portion of the Commission's Decision No. 91891 ordering modification of its original decision by adding a retroactive order giving the City a right of entry on the real property of the railroad, *without giving the railroad an opportunity to be heard or granting rehearing.*[5] The Petition for Writ of Review was denied by the California Supreme Court, without hearing or opinion, on February 18, 1981. (Appendix A) That order is reported in the advance sheets for 29 Cal. 3d (Cal. Official Reports No. 7, March 10, 1981, Minutes, p.9). A Petition for Rehearing with respect to the California Supreme Court's denial of review was timely filed by appellant herein and was denied, without hearing or opinion, by the California Supreme Court on March 18, 1981 (Appendix B) That

[5]The importance of the manner in which the Commission acted will become clear from a discussion of the applicable California statutes governing procedures by which the Commission is authorized to modify its orders and other portions of this jurisdictional statement. See footnote 6 on p.3, footnote 8 on p.5 and pp. 13-14, 18-19, 25-26.

order is reported in the advance sheets of 29 Cal. 3d (Cal. Official Reports No. 10, April 9, 1981, Minutes, p.6).

JURISDICTION

The proceeding before the California Public Utilities Commission was originally commenced by the filing of an application by the City of Salinas requesting an order authorizing construction of a grade separation over appellant's railroad yard, pursuant to "Sections 1201-1205" of the Public Utilities Code. It should be specially noted that the City at no time attempted to invoke the Commission's power, under Sections 1206-1208 of the California Public Utilities Code, to issue condemnation orders. On March 18, 1980 the Commission issued its Decision No. 91469 authorizing the grade separation and dividing the cost of construction. (Appendix C) The railroad, the appellant herein, filed a timely application for rehearing with the Public Utilities Commission challenging the manner in which it had apportioned the cost of construction. In its answer to the application for rehearing, the City included a request for a modification of the Commission's decision, "nunc pro tunc", to include a specific order awarding the City a right of entry upon the real property of the railroad for purposes of construction of the grade separation.[6]

[6]In its request, the City frankly admitted that the request for the modification arose from the fact that it was requesting a $5,000,000 allocation from the State's annual Grade Separation Fund and a question had been raised as to whether it had complied with the longstanding regulations of the California Department of Transportation, which require the filing of a right of entry upon the railroad's right of way for construction in the form of either an agreement with the railroad or an appropriate order from a body of competent jurisdiction over the subject (California Administrative Code, Title 21, Subchapter 13, Sections 1554(b) and 1552). Although it had timely filed a copy of the Commission's Decision No. 91469 with the California Department of Transportation, the City stated that it was requesting the Commission to modify the original decision by adding an order giving the City a specific right of entry because "at stake is a potential $5,000,000 in funding from the California Grade Separation Fund, plus an additional amount of approximately $729,000 representing SP's anticipated contribution

On June 3, 1980, the Commission issued its Decision No. 91891 in which it denied the railroad's application for rehearing with regard to the question of authorizing and apportioning the cost of construction of the separation.[7]

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under the order." The following day the California Department of Transportation, by letter dated April 30, 1980, did advise the City that its request for a $5,000,000 allocation from the annual Grade Separation Fund must be denied for its failure to file the required right of entry on time, stating:

> "The regulations of the Department recognize a clear distinction between the authority to construct on railroad property (Section 1554a(1)) and the permission to enter railroad property (Section 1554b(1))."

As will be pointed out (p. 12, *infra*), this is a distinction which has also been clearly recognized by the California courts and legislature.

[7]The railroad filed a Petition for Writ of Review with the California Supreme Court with respect to the Commission's decision denying rehearing of its original order. That petition for rehearing was denied, without hearing or opinion, by the California Supreme Court and such denial was subsequently the subject of an appeal to this Court in which the sole question presented was whether the California statutes providing for review of decisions of the California Public Utilities Commission, as construed and followed by the California Supreme Court, violate the requirements of the Fourteenth Amendment of the Constitution of the United States. That appeal was dismissed by this Court for want of a substantial federal question on February 23, 1981 (No. 80-932). While this appeal arises out of the same California Public Utilities Commission proceeding, its genesis is a different order of the Commission on another aspect of the proceeding and there was a separate and distinct refusal of the California Supreme Court to review. While the question of the adequacy of California review procedures is once again a question being raised, it is not the only question herein. Moreover, the order as to which review was denied by the California Supreme Court herein is one in which the Commission, as will be shown, without hearing or compensation and seemingly contrary to the very specific procedural requirements of California statutes, entered a retroactive order awarding the City an interest in appellant's real property. It was not simply a denial of review of an order apportioning costs pursuant to State statutes. In other words, in this instance it is submitted that the taking of appellant's property without due process is much clearer than in the previous appeal and, consequently, the arbitrary nature and the general unavailability of review of decisions of the

However, over the specific objection of the railroad and without a hearing or awarding compensation, it also amended and modified its original order by adding an additional ordering paragraph, effective retroactively, reading: (Appendix D, p. D-3):

> "Pursuant to Public Utilities Code Section 1204, the City of Salinas is authorized to enter upon so much of the right of way of SP as is necessary to effect the physical grade separation."*

As required by Sections 1732 and 1756 of the California Public Utilities Code, in order to exhaust its administrative remedies, on July 1, 1980 the railroad filed a new application for rehearing with the Commission with respect to those portions of the Commission's Decision No. 91896 discussing and ordering a modification of its earlier decision. This timely filed application for rehearing was denied by the Commission in its Decision No. 92299, dated October 8, 1980. (Appendix E)

California Public Utilities Commission is much more clearly demonstrated to be a substantial Federal question than it was in the previous appeal which, although arising out of the same Commission proceeding, sically involved only a Commission order apportioning costs of construction pursuant to State statute. Unfortunately, the Commission's decision and order giving rise to this appeal could not be challenged in the previous appeal to this Court because the California Supreme Court had not acted upon the Petition for Writ of Review filed with respect thereto and, therefore, the matter was not yet ripe for appeal to this Court.

*As a result of the Commission's modification of its original decision by addition of this new order, the California Department of Transportation reversed its position denying the City an allocation from the Gr[illegible] Separation Fund on the basis that the Commission's modification was retroactive to March 18, 1980. However, a declaration of the attorney for the California Department of Transportation, filed in the Superior Court of the State of California in and for the County of San Francisco, No. 76711, indicates that the California Department of Transportation will reverse its position and reassign the allocation to a different City in the event the Commission's decision is reversed or annulled on review or appeal. Therefore, the questions raised before the California Supreme Court and in this appeal are not moot.

On November 6, 1980, appellant timely filed a Petition for Writ of Review in the Supreme Court of California. In its Petition for Writ of Review appellant contended that the Commission's decision retroactively taking petitioner's property without notice, hearing or compensation, constituted a denial of due process required by the Fourteenth Amendment of the Constitution of the United States. Additionally, appellant again contended that the California statutes with respect to review of decisions of the California Public Utilities Commission, as presently interpreted and followed by the Supreme Court of California as permitting arbitrary denial of review, contravene the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States and, therefore, that the Petition for Writ of Review could not properly be denied without opinion or explanation.[9]

The Petition for Writ of Review was denied, without hearing or opinion, by the Supreme Court of California on February 18, 1980. (Appendix A) Thereafter, the railroad filed a Petition for Rehearing which was denied by the California Supreme Court, also without hearing or opinion, on March 18, 1981. (Appendix B) Although there may be some ambiguity in the rules of this Court, appellant has received telephonic advice from the Clerk of this Court that the time for filing appellant's Notice of Appeal and this Jurisdictional Statement, under the rules of the Court, is to be governed by the date of denial of rehearing by the California Supreme Court, i.e. March 18, 1981, and that both are therefore due on or before June 16, 1981. Appellant filed its Notice of Appeal to this Court in the Supreme Court of California on May 27, 1981. (Appendix F)

This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1257(2).

[9]As will be pointed out (*infra*, p.20), this is the first time the question could be raised with respect to the modified Commission order in view of the provisions of the California constitution and statutes.

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

There are a number of constitutional and statutory provisions which are relevant to this proceeding. Because of their number and length, all such provisions cited or partially quoted herein are set forth verbatim in Appendix G. They are as follows:

That portion of the Fourteenth Amendment to the United States Constitution which reads, in part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, Section 3.5, of the California Constitution prohibits the Public Utilities Commission from ruling upon the constitutionality or enforceability of statutes.

Article XII of the California Constitution, as restated, which establishes the Public Utilities Commission and provides that the legislature has "plenary power" to confer authority and jurisdiction upon the Commission and to establish the manner and scope of review of Commission action in a court of record.

Section 1201 of the Public Utilities Code which provides that no public highway may be constructed across a railroad without first obtaining the permission of the Public Utilities Commission.

Section 1202 of the California Public Utilities Code which authorizes the Commission to determine the location and type of highway-railroad crossings.

Section 1202.1 of the California Public Utilities Code which provides that, in any proceeding "under Section 1202" where the parties are not in agreement as to apportionment of costs, an applicant may obtain an interim order determining the necessity and location

of the project with costs to be apportioned by a future order. Such section further provides that in the event the applicant does not have a "right of entry" to permit it to proceed with the work, it may obtain an order of immediate possession in a "condemnation action" and may then proceed with the project.

Section 1204 of the California Public Utilities Code which provides that the Commission may apportion those costs which will not be payable by the owners of the railroad to one or more districts within the political subdivision involved, order that such things as the physical work, collection of assessments, payment of damages and acquisition of property will be done through the agency of the political subdivision "in accordance with law" and authorize the officers of the political subdivision to enter upon the right of way of a railroad to effect the physical grade separation.

Section 1205 of the California Public Utilities Code which provides a method for modification of Commission orders only for the purpose of assessing a district within a political subdivision.

Section 1206 of the Public Utilities Code which authorizes the Commission to fix "the just compensation to be paid for property or any interest in or to property to be taken" for "the separation of grades at any crossing specified in Section 1202" and, upon payment of the compensation so fixed, to "make a final order of condemnation."

Section 1207 of the California Public Utilities Code which provides that a proceeding under Section 1206 to fix the compensation for property to be taken or damaged in the separation of grades and to make a final order of condemnation upon payment of such compensation, may be commenced by an order issued on the Commission's "own motion" or by a petition filed by one of the parties "affected", such as a "City" or a "railroad corporation". This section specifically provides that such a condemnation proceeding "may

be made a part of any proceeding commenced under Sections 1202 to 1205, inclusive" and specifically prescribes what shall be contained in an order on the Commission's own motion or in a petition filed by an affected party.

Section 1208 of the California Public Utilities Code which provides, in part, that upon the filing of a petition or the making of an order on the Commission's own motion to establish compensation and issue an order of condemnation, "the Commission shall make its order to show cause", specifies what is to be contained in the order to show cause and requires service of such order to show cause.

Section 1213 of the California Public Utilities Code which provides, in part, that the Commission "shall proceed to a hearing" at the time and place specified in its order to show cause and specifies the findings that the Commission must make and file upon submission of the proceeding to fix compensation and issue an order of condemnation.

Section 1705 of the Public Utilities Code which provides, in part, that the respondent in a complaint proceeding "shall be entitled to be heard and to introduce evidence," and that the Commission in all proceedings shall include in its decision, separately stated, findings of fact and conclusions of law on all issues material to the order of decision.

Section 1708 of the California Public Utilities Code which provides, in part, that the Commission may at any time, "upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. . . . ."

Section 1731 of the California Public Utilities Code which provides, in part, that no cause of action arising out of any order or decision of the Commission shall accrue to a person in any court unless it has filed an application for rehearing with the Commission.

Section 1736 of the California Public Utilities Code which provides, in part, that after a "rehearing and a consideration of all the facts, including those arising since the making of the order or decision," the Commission may modify an original order.

Section 1756 of the California Public Utilities Code which provides, in part, that after the Commission denies a rehearing, a party may apply to the California Supreme Court for a writ of review "for the purpose of having the lawfulness of the original order or decision" inquired into and determined.

Section 1757 of the California Public Utilities Code which limits the extent of the permissible review by the California Supreme Court.

Section 1758 of the California Public Utilities Code which establishes the parties that may participate in a review proceeding and the type of judgment that may be rendered by the California Supreme Court.

Section 1759 of the California Public Utilities Code which provides that *only* the California Supreme Court shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties.

Section 1760 of the California Public Utilities Code which provides that the California Supreme Court "shall exercise an independent judgment on the law and the facts" to the extent that the validity of any Commission order is challenged on the ground that it violates a person's right under the Constitution of the United States.

STATEMENT OF THE CASE

It is necessary to understand the unique position of the California Public Utilities Commission under California law in order to gain an accurate perspective of this case. This results from the fact that the Commission is governed

by a special set of statutes and the scheme of legislation applicable to it is substantially different from legislation regulating the activities of other California administrative agencies, especially with respect to the availability of review of decisions of the Commission. Article XII, Section 5, of the California Constitution specifies that the legislature shall have "plenary power" unlimited by the other provisions of" the Constitution, to confer powers upon the California Public Utilities Commission and to establish the manner and scope of review of Commission action in a court of record. It is well established that, by reason of this constitutional provision, sections of the California Public Utilities Code giving powers to the Commission and designating the manner and extent of review of Commission decisions, have the same status as if they were part of the Constitution itself and, in fact, prevail over any other provisions of the Constiution in conflict therewith. *Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, 658 (1913).

Pursuant to the plenary power granted to it, the legislature has enacted a multitude of statutes which give the California Public Utilities Commission very extensive powers, including the power of condemnation in certain instances. However, the legislature has also gone to great lengths to specify the manner in which the Commission's powers are to be exercised and the procedures which it must follow. In particular, the legislature has been very specific concerning the procedures required for exercise of the Commission's powers with respect to condemnation of property, holding of hearings, issuance of orders, contents of decisions and, perhaps most importantly herein, modification of its orders. As will be shown, perhaps in reliance upon the likelihood that review would not be granted in any event, the statutes governing the exercise of its powers have been almost completely ignored by the Commission in this instance.

Section 1201 of the California Public Utilities Code provides that no highway will be constructed to cross a railroad at grade without first receiving the permission of the

California Public Utilities Commission. Section 1202 gives the Commission the "exclusive power" to determine whether a crossing should be required to be at separated grades, to determine the location of such crossings and to apportion the costs thereof.[10]

One of the unusual powers given to the California Public Utilities Commission is the power of condemnation. See Sections 1206 *et seq.* of the Public Utilities Code. Those sections specifically provide that a proceeding in condemnation may be made a part of any proceeding commenced under Sections 1202 to 1205. However, it has been established that an order of the Commission pursuant to Section 1202, authorizing a crossing, whether at grade or at separated grades, is not a condemnation order. Such authorization is only a prerequisite to obtaining an order in condemnation. *Northwestern Pacific R. Co. v. Superior Court*, 34 C2d 454 (1949); *Great Northern R. Co. v. Superior Court*, 126 C.A. 575 (1932). See also *Mountain View v. Southern Pacific Co.*, 1 C.A.2d 317 (1934) and *Union City v. Southern Pacific Co.*, 261 C.A.2d 277 (1968). The legislature has also clearly established this when enacting Section 1202.1 of the Public Utilities Code. Section 1202.1 provides a procedure for obtaining an interim order authorizing construction, if the other party has not given it a "right of entry", an order of immediate possession must be obtained in a "condemnation action" before the applicant may proceed with construction. Such a provision would be completely redundant and unnecessary if an order authorizing construction was the equivalent of a condemnation order or if granting of a right of entry was inherent in an order authorizing construction.

Section 1204 of the California Public Utilities Code is a section which apparently has never been previously relied

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[10]The legislature has attempted, in Section 1202.5, to restrict the Commission's powers concerning apportionment of costs by prescribing the percentages to be assessed to parties under specified factual circumstances.

upon by the Commission as the basis of a decision (or interpreted by the courts), although it has been in existence for approximately seventy years. It provides for assessments of the public portion of the cost of a separation project to districts within a political subdivision and concludes with a provision that the Commission shall authorize officers of the political subdivision to enter upon the railroad's right of way to effect a physical grade separation. Of course, this must be read and interpreted in connection with other related statutes. One of these is Section 1202.1 which, as pointed out, establishes that a right of entry is not inherent in an order authorizing construction, but must be obtained in a condemnation action. Similarly, Section 1206 gives the Commission the power to fix compensation and make a final order of condemnation with respect to property to be taken or damaged "in the separation of grades at any crossing specified in Section 1202" or for the taking of "any interest" in such property. Section 1207 provides that a condemnation proceeding under Section 1206 may be commenced either "on the Commission's own motion or by a petition filed by" a party, such as the City herein, and that the condemnation proceeding "may be made a part of any proceeding commenced under Sections 1202 to 1205, inclusive" which would, of course, include the sections relied upon by the Commission as a basis for its orders herein, including Section 1204.

The legislature has also carefully prescribed when and how the Commission may amend, alter or modify its decisions or orders. Section 1205 of the California Public Utilities Code provides for modifications only with respect to orders apportioning costs to districts within a political subdivision and could not be applicable herein. Section 1708 permits the modification of a Commission decision only "upon notice to the parties, and with opportunity to be heard as provided in the case of complaints". In this regard, Section 1705 provides that in a complaint proceeding the right to be heard includes the right "to

introduce evidence". The only other provision providing for modification of Commission orders is Section 1736 of the California Public Utilities Code which permits modification only "after . . . rehearing and a consideration of all the facts, including those arising since the making of the order or decision. . . ." No rehearing was ever granted herein.

In the California Public Utilities Code, the California legislature has also placed very severe restrictions upon the ability of a party to obtain review of Commission orders. Thus, in Section 1731 it has provided that a party will have no cause of action "in any court" with respect to any order or decision unless it has timely filed an application for rehearing with the Commission. Section 1756 provides that a party who sought rehearing may apply to the Supreme Court for a writ of review, within thirty days after a hearing has been denied or a decision on rehearing has been issued. More importantly, in Section 1759, the legislature has provided that, except for the possibility of a writ of mandamus from the Supreme Court in a proper case (a fairly rare procedure), the right to apply for a writ of review shall be the *only* method of review available with respect to decisions of Commission. That is quite different from the situation which prevails with regard to decisions of other California administrative agencies, where review is generally readily available by application to courts other than the Supreme Court by the means of so-called administrative mandamus. See, Code of Civil Procedure, §§ 1085-1094.5. Moreover, the legislature has limited the extent of the review available in the California Supreme Court with the exception that, as stated in Section 1760:

> ". . . . where the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court *shall* exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final." (Emphasis added)

The effect to be attributed to a denial of a Petition for Writ of Review with respect to a Commission decision has been the subject of two seemingly contradictory decisions by the California Supreme Court. On April 2, 1954, the California Supreme Court issued its decision in *People v. Western Airlines, Inc.*, 42 Cal. 2d 621, app. dismissed, 348 U.S. 859. That case involved an enforcement action by the Commission in the regular courts, based upon a Commission order which had been the subject of a writ of review that was denied without hearing or opinion. While the question arose is a *res judicata* context, the California Supreme Court stated (pp. 630-631):

> ". . . . . It is established, however, that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. (*Southern Calif. Edison Co. v. Railroad Com.*, 6 Cal. 2d 737, 747 [59 P. 2d 808].) This is so even though the order of this court is without opinion. (*Napa Valley Elec. Co. v. Railroad Com.*, 251 U.S. 366 [40 S. Ct. 174, 64 L. Ed. 310].)"

Following issuance of the California Supreme Court's decision in the *Western Airlines* case, it is clear that the Commission and others considered the denial of writs of review to be a determination on the merits as to questions of law involved, not only for purposes of *res judicata*, but also as precedents for purpose of *stare decisis*. That this was, in fact, the position of the Commission, was confirmed in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891, 899 (1979), in which it took that position. However, in the *Consumers Lobby* case, the California Supreme Court rejected the Commission's contention and held that (p. 905):

> ". . . although a summary denial by this Court of a petition for writ of review is a 'decision of the merits' for res judicata purposes (*Western Airlines*), it is not stare decisis."

Moreover, even though one of the parties had previously raised the same question of law and had its petition for writ of review denied, the court determined that it would not even apply the *res judicata* doctrine to that party in the *Consumers Lobby* case (p. 905).[11]

Appellant apologizes to the Court for the extensive foregoing resume. However, it is believed to be necessary to make the statement of the case more intelligible.

The proceeding before the California Public Utilities Commission was commenced with the filing of an application by the City requesting an "order authorizing construction" of a grade separation pursuant to "Sections 1201-1205, inclusive, of the Public Utilities Code." Although Rule 15 of the Commission's Rules of Procedure (20 Cal. Adm. Code 15) provides that "all applications shall state clearly and concisely the authorization or relief sought; . . . . ." the City's application did *not* set forth a request for an order either taking an easement or giving applicant a right of entry with respect to the railroad's property. Nor did it contain any generalized request for such other relief as might be appropriate.[12] Nor was there any statement or indication, either orally or in writing, at the hearings or in the briefs filed with the Commission prior to issuance of its original decision which would alert the railroad to the possibility that the City sought a right of entry

[11]For the convenience of the Court, the relevant portions of the discussions of the California Supreme Court on this point in the *Western Airlines* and *Consumers Lobby* cases are reproduced as Appendix H and Appendix I.

[12]Appellant has complied with the admonition in this Court's Rule 13 that requests to certify the record should not be made as a matter of course prior to action by the Court on the Jurisdictional Statement. However, if the Court notes probable jurisdiction, appellant will request that the entire record in the Supreme Court of California be certified, consisting of the Petition for Writ of Review and Appendix, the answers of the Commission and the City and the reply of appellant. With these documents, the Court will have before it most of the formal pleadings and decisions or orders of both the California Public Utilities Commission and the Supreme Court. However, it should be kept in mind that the California Supreme Court never had the complete record of the pro-

on the property of the railroad. Nor was any such relief or order contained in the Commission's original decision. In fact no such relief was requested until *after* the City realized that it might have failed to timely file a right of entry with the California Department of Transportation, thereby jeopardizing its right to obtain an allocation from the state's annual grade separation fund.

Although the Commission's original decision and order was issued on March 18, 1980, it was not until April 30, 1980, as part of its response to the railroad's application for rehearing, that the City requested the Commission to "amend its order" "nunc pro tunc", by adding a specific order giving the City a right of entry upon the property of the railroad. The railroad filed a response objecting to the request and pointing out that both California cases and statutes established that a right of entry could be granted only by taking an interest in the real property of the railroad, that Sections 1201-1205 of the California Public Utilities Code do not provide for eminent domain actions and that the City had never requested the Commission to exercise its condemnation authority pursuant to Sections 1206 and 1207 of the California Public Utilities Code. Moreover, it also contended that, under such circumstances, entering an order without a hearing as requested by the City would constitute a taking of respondent's property in violation of the fundamental principals of federal due process.

Subsequently, on May 16, 1980, the City served a supplemental brief by mail, contending for the first time that because of the provisions of Section 1204 of the Califor-

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ceeding before the California Public Utilities Commission before it since it denied review. The California Public Utilities Commission is required to certify the record before it to the California Supreme Court only when the Supreme Court issues its writ of review, which it did not do in this case. Therefore, a certification of the record will contain only those portions of the record before the California Public Utilities Commission which have been set forth in the Petition for Writ of Review and other pleadings filed with the California Supreme Court, including the Appendix to the Petition for Writ of Review.

nia Public Utilities Code, a right of entry was inherent in *any* order authorizing construction of a crossing, despite the specific provisions of Sections 1206-1208 of the California Public Utilities Code setting forth the procedures for condemnation. On June 2, 1980, the railroad filed a response thereto pointing out that Section 1204, by its own terms, was not applicable to this proceeding, that the requested modification would constitute a condemnation of an interest in the railroad's property and that the railroad was entitled to notice and an opportunity to be heard before having its property condemned. The railroad also specifically requested that if the City's request for modification was to be considered, it should be set down for hearing before issuance of any order in view of the lack of previous notice or opportunity to be heard and present evidence.

On June 3, 1980, the Commission issued its Decision No. 91891 in which it denied the railroad's application and specifically modified its original decision by adding an additional ordering paragraph to provide:

> "Pursuant to Public Utilities Code Section 1204, the City of Salinas is authorized to enter upon so much of the right of way of SP as is necessary to effect the physical grade separation."

Following issuance of the Commission's Decision No. 91891, the railroad timely filed an application for rehearing in which it pointed out that the Commission had amended its order without complying with the specific requirements of Sections 1708 and 1736 of the California Public Utilities Code, which do not permit modification without either granting a rehearing (Section 1736), which the Commission had not done, or providing an "opportunity to be heard as provided in the case of complaints" (Section 1708). Section 1705 of the California Public Utilities Code, of course, provides that in the case of complaints a party is "entitled to be heard and to introduce evidence". Therefore, since the railroad had been denied a rehearing and had been given no opportunity

to present evidence, the Commission had modified its order in a manner which contravened the requirements of Sections 1708 and 1736 of the California Public Utilities Code governing the modification of orders by the Commission.

In its application for rehearing, the railroad also pointed out that Section 1204 of the Public Utilities Code, *by its own terms,* could not be applicable in this proceeding. The railroad also pointed out that the Commission was not entitled to issue retroactive orders of this type in any event and that its modified order constituted the taking of a property interest under circumstances which denied the railroad its due process rights under the Fourteenth Amendment to the Constitution of the United States.

On October 8, 1980, the Commision issued its Decision No. 92299, denying the railroad's application for a rehearing. While that decision attempted to prop up its previous order by changing some language and adding some contradictory conclusions of law, it did not revoke its modified order, which had been issued without hearing or a rehearing, and did not discuss the railroad's principal contentions in any way.

Following the denial of rehearing by the Commission, a timely Petition for Writ of Review was filed with the California Supreme Court on November 6, 1980. It was pointed out therein that the Commission's modified order constituted the retroactive taking of petitioner's property by the Commission, that the order was entered without complying with the procedural requirements of Sections 1708 and 1736 of the Public Utilities Code and without notice, hearing or compensation, thereby denying both substantive and procedural due process required by the Fourteenth Amendment of the Constitution of the United States. It was also pointed out that the Commission's reliance upon Section 1204 of the California Public Utilities Code was erroneous and that Section 1204, by its own terms, could not be applicable in this proceeding. The Petition also pointed out to the California Supreme Court that, since the validity

of the Commission's decision was being challenged, in part, on the ground that it violated both substantive and procedural due process rights of the railroad under the Constitution of the United States, Section 1760 of the California Public Utilities Code required it to exercise its independent judgment upon the law and the facts. Of course, it could not do this without granting review since, otherwise, the record before the Commission would not be certified to the California Supreme Court.

In its Petition for Writ of Review to the Supreme Court, the railroad also raised the question of the correctness of the California Supreme Court's decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979), in which it held that, contrary to what even the Commission long thought to be established law in California, a denial of writ of review without opinion is not a ruling on the merits as to either the facts or the law for the purposes of *stare decisis*. The railroad further contended that an arbitrary denial of writ of review, in view of the clear need for review in this proceeding, would also constitute a denial of federal due process by the California Supreme Court.[13]

On February 18, 1981, the California Supreme Court entered its order denying the Petition for Writ of Review. On March 5, 1981, the railroad filed a Petition for Rehearing in which it again pointed out the complete failure of the Commission to comply with the requirements of

[13]The question of the propriety of the California Supreme Court's decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979) could not be raised prior to its inclusion in the Petition for Writ of Review to the California Supreme Court. The contentions concerning that case are basically that the California Supreme Court has interpreted statutes governing review of Commission decisions in such a way as to make them unconstitutional. Therefore, the question could not be raised before the Commission since it was not relevant to the Commission's decision and the Commission could not have ruled upon the question in any event in view of Article III, Section 3.5 of the California Constitution, which provides that the Commission has no power to declare a statute unconstitutional.

Sections 1708 and 1736 of the California Public Utilities Code in amending its original order. It was also pointed out that the case involved serious federal constitutional questions which could only be resolved by the granting of review, that the denial of review, in fact, directly contravened previous decisions by the California Supreme Court and that, although Section 1204 of the California Public Utilities Code had been in existence for approximately 70 years, so far as it can be determined it has never before been relied upon by the Commission as the basis for an order and has never been the subject of a decision by either a court or the Commission. In other words, the applicability of Section 1204 of the California Public Utilities Commission represented a question of first impression which would obviously become a precedent for future actions by the Commission even if a denial of the Petition for Writ of Review by the California Supreme Court would not come within the doctrine of *stare decisis*, since the Commission could simply point to its own decision as the precedent. The Petition for Rehearing was denied by the California Supreme Court by order entered on March 18, 1981. (Appendix B) Thereafter, on May 27, 1981, appellant filed its Notice of Appeal to the Supreme Court of the United States in the Supreme Court of California and several copies of the notice upon all parties to the proceeding. (Appendix F)

REASONS WHY THE QUESTION PRESENTED IS SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THIS COURT

Appellant submits that there can be no real dispute about the fact that the Commission has granted the City an interest in the railroad's real property, without hearing or an opportunity to prevent evidence, and in so doing has acted directly contrary to the requirements of California law prescribing the manner in which the Commission may modify its decisions. Similarly, it is submitted that the action of the Commission in this instance so clearly constitutes a denial of the fundamental principles of due process required by the Fourteenth Amendment of the

Constitution of the United States, that it must be concluded that the refusal of the California Supreme Court to review the decision was arbitrary and not on the merits. Consequently, the action of the California Supreme Court in denying review also violates the due process requirements of the Fourteenth Amendment of the Constitution of the United States and the California statutes providing for review of decisions by the Commission, as presently construed and followed by the California Supreme Court so as to permit such arbitrary denial of review, in turn violate the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

I. The Commission's Order Granting a Right of Entry to the City Constitutes the Taking of a Property Right

There can be no question about the fact that, in California, a railroad's right of way is private property which can only be taken in a condemnation action. As stated in *City of Oakland v. Schenck*, 197 Cal. 456, 460 (1925):

> "It may not be questioned that a railroad's right of way is so far private property as to be entitled to the protection of the constitution so that it can only be taken under the power of eminent domain; and a condition precedent to the exercise of that power is that the statute conferring it make provision for reasonably compensating the owner."

In Decision No. 91891, the Commission originally described its order, as modified, as being "in the nature of a license". (Appendix D, p. D-3). That was a correct description of a right of entry if, as the Commission contends, it did not intend to convey a property right. However, it is simple hornbook law that what the Commission has attempted to grant to the City really is a "license"—just as it originally stated in its Decision No. 91891. See, for example, 28 Cal. Jur. 3d, *Easements and Licenses*, §§ 6, 61-62; 25 Am. Jur. 2d, *Easements and licenses*, § 123.

The real problem with the Commission's Decision No. 91891 was not its statement that a right of entry as awarded by the Commission is "in the nature of a license",

but that the Commission overlooked the fact that a license cannot be granted except by one who already has a property right. In other words, the problem is that before the Commission can give a right of entry or "license", it must first acquire the necessary property rights from petitioner.

An essential element of a license is that it be assented to by the party whose interest in the land will be affected by the use. *Restatement of Property*, Section 512, Comment h (1944). In other words, a license can only be given *by the owner or one having a property right in the land* to which the license applies and a license clearly cannot be granted by one who has no rights in the property. *Engelhardt v. Gravens*, 281 S.W. 715, 718 (Mo. 1926); *Norfolk Dredging Co. v. Radcliffe Materials, Inc.* 264 F. Supp. 399, 402 (E.D. Va. 1967); see also 53 Corpus Juris Secundum, *Licenses* § 82, p. 809.

Since a license can only be given by one who has a property right to begin with, it must follow that the Commission's order giving a right of entry to the City actually constitutes an order taking a right in petitioner's property. In other words, the order of the Commission authorizing the City to enter upon petitioner's property without its consent, is a taking of petitioner's property. *Pacific Telephone, etc. Co. v. Eshleman*, 166 Cal. 640, 647 (1913); *Erro v. City of Santa Barbara*, 123 Cal. App. 508, 513 (1932).

That giving a right of entry constitutes the taking of petitioner's property, is also established by other provisions of the Public Utilities Code. One of the sections that must be looked at in ascertaining the meaning of the last sentence of Section 1204, is Section 1202.1. In Section 1202.1 the Legislature has made it unmistakably clear that a right of entry is a property right by requiring that only an order of immediate possession in a "condemnation action" can be a substitute.

II. Section 1204 of the California Public Utilities Code Will Not Support the Commission's Amended Order

The order added by the Commission when modifying its original decision, by its own terms, relies upon Section 1204

of the California Public Utilities Code for authority to issue such an order. The reliance of the Commission on Section 1204 is clearly misplaced.

Even assuming, arguendo, that Section 1204 could be applicable in this proceeding, it is clear that it will not, in and of itself, support the issuance of an order, without hearing or evidence, granting an interest in the property of the railroad. As pointed out by the California Supreme Court in *City of Oakland v. Schenck*, 197 Cal. 456, 460 (1925), a railroad's right of way is private property which can only be taken by condemnation and awarding reasonable compensation to the owner. The Commission does have the power of condemnation under Sections 1206 and 1207, and Section 1207 of the California Public Utilities Code specifically provides that a condemnation proceeding which has been properly instituted, either on the Commission's own motion or by a petition filed by a party, may be made a part of a proceeding under Section 1204. However, the simple fact is that no condemnation action was ever properly instituted in this proceeding.

Wholly apart from the fact that there has been no attempt to invoke the Commission's condemnation powers, it is clear that Section 1204 could not be applicable in this proceeding in any event. By its own terms it is limited to factual situations which are not present in this case.

General applicability of a statute is frequently limited by stating the "case" or "condition" which, as stated in *Sutherland on Statutes and Statutory Construction*, Vol. 1A, p. 85, 4th edition (1972):

> ". . . establishes circumstances or conditions that must operate or occur before the act applies to a given individual. Thus the designation of the facts which make the statute applicable is normally spoken of as the "case." *The condition* does essentially the same kind of thing as the case, by *further narrowing the range of situations* or circumstances *subject to the rule* of the act. Although the difference between them is merely one of degree, it is customary to begin

> the statement of a legislative proposition with a clause identifying the general class of circumstances to which the act applies. This is the statement, often commencing with the word "when", that is called the case. *Language which further restricts the applicability of the act, often commencing with either "if" or "where", is called the condition.* (Emphasis added).

Section 1204 is limited in its application by just such a "condition".

Despite the clear limitation of Section 1204 by a "condition", since the section starts with the word "if", the Commission has chosen to ignore this condition and rely solely on the last sentence of Section 1204 out of context. However, it is clear from the first sentence of Section 1204 that the section is of limited applicability and one sentence cannot be plucked out of it for use in this proceeding since the section is not applicable to the facts in this proceeding. Because the City in this instance has not made the required finding and it is not requesting that any portion of the costs be assessed against a district within the city, it is submitted that the Commission's reliance upon Section 1204 of the Public Utilities Code is erroneous. Moreover, if Section 1204 were applicable despite the lack of the requisite jurisdictional facts, then the more recently enacted Section 1202.1 would also be applicable. The second paragraph of Section 1202.1, which is a much more recent statute, clearly indicates that in the event of failure of a railroad to voluntarily grant a right of entry, it is the obligation of the applicant to obtain an order of immediate possession in a "condemnation action" as a substitute.

III. In Modifying Its Original Order by Adding a Retroactive Ordering Paragraph Without a Hearing or Rehearing, the Commission Has Acted Directly Contrary to the Requirements of California Procedural Statutes

The Commission in this instance, beyond any reasonable doubt, has modified its order without attempting in any way to comply with statutory provisions governing the manner in which it is permitted to modify its orders.

Section 1736 permits modification only if a rehearing is granted. That was not done in this instance. Section 1708 permits modification only after providing an opportunity to be heard as in the case of complaints and Section 1705 provides that, in the case of complaints, an opportunity to be heard includes a right to present evidence. Thus, the Commission clearly has not complied with Section 1708 either. In other words, the Commission has issued its decision taking an interest in appellant's real property without providing appellant an opportunity to present evidence and in a manner which flagrantly disregards California statutes setting forth the procedures to be followed by the Commission when modifying its orders.

IV. The Commission's Order Modifying Its Original Decision Constitutes a Clear Denial of Due Process

The action of the Commission in entering the order modifying its original decision, retroactively granting the City a right of entry on appellant's property, clearly constituted a taking of appellant's property without notice, hearing or compensation, contravened specific state statutes governing procedures for amending Commission orders, and constitutes a clear denial of both substantive and procedural due process required by the Fourteenth Amendment of the Constitution of the United States. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1914); *Chicago Junction Case*, 264 U.S. 258, 265 (1924); *United States, etc. v. Abilene & Southern Ry.*, 265 U.S. 274, 288 (1924); *Northern Pac. Ry. v. Department of Public Works*, 268 U.S. 39, 44-45 (1925); *Chicago R.I. & P. Ry. v. United States*, 274 U.S. 29, 33 (1927); *Southern Ry. v. Virginia*, 290 U.S. 190, 196-197 (1933); *Nashville C & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935); *Morgan v. United States*, 298 U.S. 468, 480-81 (1936); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950); and *Fuentes v. Shevin*, 407 U.S. 67, 80 (1971).

Since the action of the Commission in entering a retroactive order, without hearing, so clearly constitutes a denial

of both substantive and procedural due process under the Fourteenth Amendment of the Constitution of the United States, it is clear that the California Supreme Court should have been granted review and its failure to do so was necessarily an arbitrary action. As such, denial of review by the California Supreme Court, in turn, clearly constitutes a denial of federal due process.

V. California Statutes Providing for Review of Decisions of the Commission, as Presently Construed and Followed by the California Supreme Court, Violate the Requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States

The California Supreme Court recently issued its decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891 (1979), in which it held that, contrary to what even the Commission has long thought to be established law in California, a denial of a writ of review without opinion is not a ruling on the merits as to either the facts or the law for purposes of stare decisis. It is submitted that such holding is unreasonable and erroneous.

It is difficult to understand why a decision cannot be cited under the doctrine of stare decisis if a denial of a writ of review without opinion is, in fact, a "decision on the merits both as to the law and the facts presented". *People v. Western Airlines, Inc.*, 42 Cal.2d 621, 630-631 (1954). If denial of a writ of review, even without opinion, is in fact "a decision on the merits both as to the law and the facts", there is absolutely no reason why such decision should not be subject to the doctrine of *stare decisis*. The only logical conclusion that can be reached if such decisions do not come within the doctrine of *stare decisis* is that they are not, in fact, "on the merits" and that the California Supreme Court actually treats the granting or denial of a petition for writ of review of Commission decisions as a matter which can be arbitrarily decided, even

though it is the only method of review available to parties before the Commission. Unfortunately, its denial of review in this case and the frequency with which this Court has denied petitions concerning Commission decisions during the last 30 years, would seem to indicate that this actually is the Court's position.

Commencing with issuance of Volume 50 of its printed reports, issued in approximately June of 1952, the Commission began placing in the forefront of each volume a listing of Commission decisions with respect to which parties had attempted to obtain a hearing in the Supreme Court and a statement as to whether hearing was granted or denied. The Commission has continued its practice of placing such a table in the forefront of each of its bound volumes through and including Volume No. 83, which is the most recently issued bound volume. Volumes 50-83 of the California Public Utilities Commission reports commence with Decision No. 44624, issued on August 8, 1950, and end with Decision No. 88773, issued on May 2, 1978. Thus, Volumes 50-83 of the California Public Utilities Commission Reports cover 44,150 decisions of the Commission. From a check of the listings in the forefront of each of the bound volumes, it appears that there were only approximately 393 attempts to institute a proceeding in the California Supreme Court. More importantly, it appears that a hearing was granted (but not necessarily held) in approximately only 50 cases. Thus, only about 12.7 percent of the attempts to obtain a hearing by the California Supreme Court, over approximately a 28 year period, were successful. Moreover, 393 attempts to obtain a hearing represents only approximately .009 of the 44,150 decisions covered by Volumes 50-83 of the Commission Reports. The 50 hearings granted represent only slightly more than .001 of such decisions. It is somewhat astonishing that, over a 28 year period, the California Supreme Court has discovered only 50 decisions which merit review.

If denial of a writ of review by the California Supreme Court is only meaningful for *res judicata* purposes, there is

absolutely no need for it to describe it as being a decision "on the merits" as to *either* the law or the facts. Any final denial, with or without opinion, would be *res judicata* between the parties as to that proceeding. It does not matter, for purposes of *res judicata,* whether the decision is on the merits as to either the law or the facts. To assert that such a denial without opinion is a decision on the merits, as the California Supreme Court has done, can only serve to mislead, as it apparently has for many years.

In fact, in the *Consumers Lobby* case, the Commission itself was one of the parties which apparently asserted that denial, even without opinion, came within the doctrine of *stare decisis* (p. 899). Thus, apparently the Commission, as well as others, was misled by the statement in the *Western Airlines* case that denial of a petition for writ of review of an order of the Commission "is a decision on the merits both as to the law and the facts presented in the review proceeding. This is so even if the Order of this Court is without opinion. . . ." (pp. 630-631). Moreover, since this Court dismissed the appeal from that Decision, 348 U.S. 859, it is conceivable that it too was misled by such a statement.

In support of its decision in the *Consumers Lobby* case, the California Supreme Court mentions several bases on which writs of review could be denied where they could not properly be given stare decisis effect (pp. 902-904). However, the types of grounds mentioned very rarely occur and certainly not to the extent to which petitions for writ of review from decisions of the Commission are regularly denied by the California Supreme Court. Moreover, they certainly are not present in this case.

Since the Commission has clearly and undeniably acted unlawfully and in excess of its authority in this proceeding, denial of a writ of review without opinion can only be interpreted as an arbitrary action by the California Supreme Court and not a review on the merits as to either the facts or the law. In that event, it would seem clear

that available review of decisions of the California Public Utilities Commission is inadequate to meet the due process requirements of the Fourteenth Amendment of the Constitution of the United States. Moreover, there can be no real question about the fact that the availability of an adequate opportunity for review of administrative decisions, such as Decision Nos. 91891 and 92299 in this case, is an essential requirement of due process required by the Fourteenth Amendment of the Constitution of the United States. *Ohio Valley Co. v. Ben Avon Borough*, 253 U.S. 287, 289, 291 (1919); *Bluefield Co. v. Public Service Commission*, 262 U.S. 679, 689 (1922); *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *Lehigh Valley R.R. v. Commissioners*, 278 U.S. 24 (1928).

CONCLUSION

Appellant respectfully submits that it would be difficult to find a clearer case of the taking on an interest in the real property of a private person in direct contravention of the fundamental requirements of federal due process. Moreover, in view of the fact that review was denied despite the Commission's blatant disregard of the requirements of California statutes as well as the requirements of Section 1 of the Fourteenth Amendment of the Constitution of the United States, it has also been demonstrated that the available review of Commission decisions under California statutes, as presently construed and followed by the California Supreme Court, is woefully inadequate. Therefore, appellant earnestly requests this Court to note probable jurisdiction and to reverse the judgment below.

Dated June 15, 1980.

Respectfully submitted,

HAROLD S. LENTZ

Attorney for Appellant

(Appendices Follow)

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Portion of the Opinion of the California Supreme Court in *People vs. Western Airlines, Inc.*, 42 Cal.2d 621 (1954), appearing at pages 629-632	H-1-H-4
Appendix I	
Portion of the Opinion of the California Supreme Court in *Consumers Lobby Against Monopolies vs. Public Utilities Commission*, 25 Cal.3d 891 (1979), appearing at pages 899-905	I-1-I-9

Appendix A*

Order Denying Writ of Review

S.F. No. 24234

In the Supreme Court of the State of California

In Bank

Southern Pacific Transportation Company etc.,
Petitioner,

v.

Public Utilities Commission,
Respondent;
City of Salinas,
Real Party in Interest.

Petition for writ of review DENIED.

(Filed February 18, 1981)

/s/ BIRD

Chief Justice

*Because of the somewhat unique provisions of California law governing review of decisions of the California Public Utilities Commission, it is difficult to determine the proper order of Appendices A-E herein in order to comply with section 1(j) of the Court's Rule 15. It is felt that the order selected is the most appropriate since it is the action of the California Supreme Court in refusing a hearing which gives rise to this appeal and it is that decision as well as the decisions of the Public Utilities Commission, which appellant seeks to have reviewed.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Mar 18 1981

In have this day filed Order_____

_____

_____

REHEARING DENIED

In re: SF No. 24234

Southern Pac Co

vs.

PUC

Respectfully,

Clerk

Appendix C

Decision No. 91469 March 18, 1980

Before the Public Utilities Commission
of the State of California

Application No. 59126
(Filed September 6, 1979)

Application of the City of Salinas for an order authorizing construction of a crossing at separated grades of a crossing at separated grades between Davis Road and the tracks of the Southern Pacific Transportation Company, sometimes referred to as the Davis Road Overhead. PUC No. E-117.23-A.

Raymond M. Haight, City Attorney, for the City of Salinas, applicant.

Harold S. Lentz, Attorney at Law for Southern Pacific Transportation Company, respondent.

Robert W. Stitch, for the Commission staff.

OPINION

The application of the city of Salinas (City) requests an order authorizing construction of a crossing at separated grades between Davis Road and the tracks of the Southern Pacific Transportation Company (SP), sometimes referred to as the Davis Road Overhead (PUC No.

E-117.23-A.), and that the Commission apportion 10 percent of the cost of the Davis Road Overhead project to SP pursuant to the provisions of Section 1202.5(b) of the Public Utilities Code (PU Code):

> "(b) Where a grade separation project initiated by a public agency will directly result in the elimination of one or more existing grade crossings, located at or within a reasonable distance from the point of crossing of the grade separation, the commission shall apportion against the railroad 10 percent of the cost of the project. The remainder of such costs shall be apportioned against the public agency or agencies affected by such grade separation."

As City and SP have not voluntarily executed a written agreement to share the project cost, duly noticed public hearings in the matter were held before Administrative Law Judge Orville I. Wright (ALJ) in San Francisco, California, on February 11, 13, 14, 15, and 19, 1980. At the conclusion of the hearings the matter was submitted subject to the filing of concurrent briefs by the parties, due March 3, 1980.

Decision No. 90399 dated June 5, 1979 established that Boronda Road is Number 22 in priority of railroad crossings which we determined to be most urgently in need of separation or alteration for the year 1979-1980. The Davis Road grade separation (project) is advanced by City as qualifying to replace it. We are to determine here whether the project will directly result in the elimination of the Boronda Road crossing and whether the project is within a reasonable distance from Boronda Road. We are also to determine the merits of several objections to our approval of the project raised by respondent.

The draft environmental report is entitled "Davis Road Extension and Grade Separation", indicating the two purposes to be served by the project: (1) to provide the final link in a chain of arterials around the perimeter of City and (2) to eliminate the Boronda grade crossing. City's program essentially joins two projects into a single plan.

The geometric limits of the Davis Road grade separation (project) for which the City seeks an apportionment of 10 percent of the cost to SP are set forth on pages 5 and 6 of Exhibit 1, and are as follows:

1. The removal and closure to traffic of the existing Boronda Road Grade Crossing, PUC No. E-116.7, and the cul-de-sac and barricades required in connection therewith.

2. The northerly approach roadways, supporting embankments, and appurtenances of the Davis Road Overhead extending to the northerly end of the sag vertical curve at or about Station 113 + 50. For right-of-way costs, the amount shall be determined by prorating the area required south of said Station 113 + 50, as related to the total area to be acquired between the SP's existing northerly right-of-way line and West Rossi Street.

3. Relocation of the Monterey County Flood Control and Water Conservation District Canal.

4. Two bridge structures, one spanning West Market Street and the second spanning the SP tracks and right-of-way.

5. All approach roadways, embankments, and appurtenances, southerly of the Davis Road Overhead structure, extending to Station 96, except that work associated with

Ramps C and D, which do not carry traffic across the railroad, are excluded, as set forth below.

6. For right-of-way cost south of West Market Street, 51 percent of the net cost of the rights-of-way required for the total grade separation project and the several loops and approach roadways between the north line of Via Maria on the south and the existing state-owned right-of-way of Route 183 along West Market Street.

7. Pavement widening along West Market Street, as necessary to provide channelized left turn pockets to Ramps A and B and temporary detours, as needed, to carry traffic through construction.

8. Railroad work, flagging, adjustment of trackage, adjustment to signal and communication lines, and the like, all as may be described in a subsequent Railroad Agreement.

Those portions of the project for which the City does not seek an apportionment of cost to SP are set forth on pages 6 and 7 of Exhibit 1, and are as follows:

9. Traffic signals and roadway lighting along West Market Street.

10. Ramps C and D.

11. Approach roadways and associated rights-of-way northerly of the north end of the sag vertical curve at or about Station 113 + 50.

12. Approach roadways and pro rata portion of rights-of-way southerly of Station 96 + 00, as described in paragraph 2 above.

The total cost of the project is estimated at $7,296,000 of which $490,000 represents extension of the overpass over

the distance of three additional contemplated tracks at the request of SP.

That the project will directly result in the elimination of the Boronda Road crossing is a fact virtually uncontradicted by respondent. The evidence shows that the project would provide a portion of the connector route around the City generally following the adopted Freeway Route which was abandoned by the California Department of Transportation. City, with County of Monterey participation, has constructed 1.2 miles of this route as a 4-lane highway from Route 68 westward to Alisal Street. Monterey County is now constructing an extension of the 4 lanes from Alisal Street westward 0.42 miles to Davis Road. From the U.S. 101 interchange at Laurel Drive, developers have extended Davis Road southerly approximately 0.6 miles. The project will connect this southerly extension of Davis Road with that portion of Davis Road which lies south of Market Street. (Exhibit 11, pages 2-4; also see TR 43:16 to 44:30; 16:12 to 17:3; 114:22 to 115:1.)

Construction of the project will greatly improve convenience to the motoring public by providing a much more direct north-south travel corridor in the western part of City. It will provide a quicker, safer route for the vast majority of the motoring public which presently uses Boronda Road. It will save a great deal of travel time for residents in the southwest portion of the City who wish to travel to the northern part of City, particularly to the regional shopping center or to U.S. 101 (TR 28:12-25; also see TR 30:12-30; 228:27 to 229:1). The converse is also true, to wit: construction of the project will substantially benefit those individuals in the northwestern part

of City who wish to travel to the southern part of town or beyond to such areas as Fort Ord (TR 168:10-20).

The record further reveals that the project will provide a more direct and convenient north-south corridor for the motoring public living in or traveling through the western portion of City, as opposed to the present corridor located at Boronda Road, a significant savings in travel time and fuel cost would be effected. The project ". . . is a much more direct route, cutting down the distance they'd have to travel. It furnishes a much faster route. It saves them a lot of time, as well as mileage on their cars." (TR 28: 22-25). ". . . with the shorter travel distance, there is savings to the public in terms of less travel distance, less fuel consumption, less pollution to the environment due to vehicles traveling out of their way, wasting fuel at grade crossings or going into them." (TR 229:9-14).

We believe that the record amply demonstrates that the project will provide a far more convenient traffic corridor over the SP tracks than does Boronda Road and will directly result in the closing of the latter crossing.

SP apears not to seriously contend otherwise. It, however, alleges that because the Boronda Road crossing is in Monterey County (County) outside the limits of City, the Commission is precluded from ordering its closure because County is not a party to this proceeding. No authority is cited for this argument by SP.

SP confuses appearance at the hearing with notice thereof and an opportunity to be heard. County received

notice of OII 32 wherein Boronda Road was given a ranking of Number 22 on the priority list. County has nominated City as lead agency for project purposes and for purposes of the environmental impact report filed in this proceeding. In these circumstances, the Commission's exclusive power to alter, relocate, or abolish by physical closing any crossing heretofore established is abundantly clear.

SP argues that too high priority was given to Boronda Road in Decision No. 90399. But that proceeding was concluded on June 5, 1979 without petition for rehearing having thereafter been filed by SP. The time is long past for relitigation of OII 32.

A more difficult question is whether the project is within a reasonable distance from the point of crossing at Boronda Road.

SP witnesses testified that cost is one measure of the reasonableness of an overpass to be located at a point other than at the point of crossing to be eliminated. City's expert witness submitted a feasible overpass plan for Boronda Road which he estimated to cost $4,852,000 as compared with the $7,296,000 cost estimate for the project. There appears not to have been any case in the records where an overpass located apart from the grade crossing itself costs more than construction at the crossing itself.

We agree, along with the witnesses of SP and of City, that other factors than cost alone must be taken into account by the Commission in cases such as this one. These factors include public safety, traffic service, existing devel-

opment in the area, established land use patterns and plans, and facility and time of response by emergency vehicles.

The evidence shows that, when constructed, the project will directly connect State Route 183 with U.S. 101 on the westerly side of the City, eliminating the necessity for vehicles to travel into the heavily congested downtown area to accomplish the same linkup. (Exhibit 11, page 3.)

The project will improve access to nearby neighborhoods. It is at a location where it offers a substantial benefit to large segments of the community on each side of the project (TR 30:12-30; 228:27 to 229:1; 339:3 to 400:11).

The project would greatly improve the access of emergency vehicles (fire, police and ambulance vehicles) to areas adjacent to or near the project area, and would significantly enhance their emergency response time (TR 29: 25 to 30:11), by as much as 1 minute, in that it would alleviate the present situation which entails an adverse travel distance of as much as ½ mile for many emergency trips (TR 271:10-19). There is evidence that the City is planning to construct a new fire station in the Rossi-Rico area which would serve neighboring areas north and south of West Market Street and ". . . this is not really possible without having both the grade separation as well as one that is located close enough to make the running time for a fire engine at a minimum" (TR 29:21-24).

The Davis Road alignment is consistent with City's Rossi-Rico Land Use Plan, which shows Boronda Road as terminating just prior to and on the north side of the SP

tracks, and the project being built on the Davis Road alignment. (Exhibit 5; TR 31:26 to 32:2.)

The Davis Road alignment is the logical and appropriate location for the project, for the additional reason that substantial development of the Rossi-Rico area is planned in the immediate future. Exhibit 11, page 3, discloses the following planned development:

> "The construction of approximately 1,000 single family homes and 600 apartments has been approved, and some are now complete. The United States Postal Service has purchased land in the area and is building a regional distribution center. The Salinas Elementary School District has completed a half million dollar extension of the elementary school which will serve the area. Without the construction of the proposed overpass, the projected growth indicated for the area will certainly suffer from inadequate traffic circulation. An Improvement District is being formed as a separate project to improve the internal circulation within the area."

It is expected that substantial growth will take place in the Rossi-Rico area (TR 131:23-27):

> "... because that has the public facilities already there, is already annexed, and has a project that's been approved, and is being designed for the portion of Davis Road north of Rossi Street, and also Rossi Street out to Main."

A portion of North Davis Road has already been constructed, with an interim connection to Laurel Drive; a portion has already been constructed to a 4-lane divided highway, with a 106-foot right-of-way (TR 178:8-16). A

portion of Rossi Street extending out to Main Street has already been approved by the City Council; an assessment district has been formed to pay for portions of the Davis Road and Rossi Street extensions (TR 178:17-26). All of this has been done in anticipation of the Davis Road Overhead project (TR 178:27 to 179:8). The City has also expended approximately $200,000 (about ½ of which is project eligible) for purchasing rights-of-way in the area for the purpose of improving Davis Road and Rossi Street (TR 179:9-26). Other developments have taken place as set forth in Exhibit 11, page 2.

The investment in the aforereferenced public improvements that have been constructed or planned would be substantially and adversely affected if the project were not built on the Davis Road alignment. City argues that any other alignment, giving consideration to all the surrounding circumstances, would not only be wasteful, but illogical and inappropriate as well.

City has approved the Davis Road alignment (TR 31:30 to 32:6; 253:5-8). County has approved the Davis Road alignment (TR 35:1-25; 253:17-21) and has entered into an agreement with City whereby the latter is to act as lead agency with respect to preparation of studies and the filing of applications with the Public Utilities Commission. In addition, County has budgeted $150,000 toward the engineering costs of the project for this fiscal year and has also shared in ½ of the cost of the preliminary analysis of the project (TR 35:1-22; Exhibit 11, page 1). An agreement between the City and the County relating to sharing in the cost of construction of the project is presently being

prepared and will probably be executed within a short period of time (TR 35:23-25).

City's expert witness testified to the validity of design criteria for a hypothetical feasible overpass at Boronda Road at less cost than that for the project. He testified that, while the overpass would be adequate, the route of vehicular traffic which would result would be "lousy". (TR 271:3)

City's testimony is that there would be adverse environmental effects from the hypothetical configuration because all of the alignment south of the SP tracks goes through agricultural property, and on the north side of the SP tracks it goes through an area susceptible to flooding. It also interferes with the Rossi-Rico Land Use Plan which calls for open space in the area. It would require adverse travel distance for the motoring public. Specifically, it would generate approximately 3,321 vehicle miles per day of adverse travel (based on a level of 10,000 vehicles per day). This, in turn, would result in a fuel waste amounting to $565 per day, or slightly more than $200,000 per year. Approximately 67,342 gallons of gas would be wasted per year. By 1995, based on a level of 33,000 vehicles per day, this would amount to approximately 250,000 gallons of wasted fuel per year as compared to the Davis Road Overhead alignment (TR 269:9 to 270:23; 179:27 to 182:18; TR 316:26-29.)

All of the aforesaid facts, taken together, persuade us that the project is in reasonable proximity to the grade separation to be eliminated and that it is in the public interest that the project be approved even though its cost,

standing alone, is substantially in excess of the feasible hypothetical configuration at Boronda Road. The distance between the two points is 2,300 feet which we find to be reasonable.

The motion of SP to bring County into this proceeding was properly denied by the ALJ.

No other issues require discussion.

Findings of Fact

1. Public convenience and necessity require that the City be authorized to construct a crossing at separated grades along the alignment of Davis Road, spanning the tracks of SP between Rossi Street and south of West Market Street, as more particularly described in the application and attached exhibits, for both motorized and nonmotorized traffic, to be identified as Crossing E-117.2-A.

2. City is the lead agency for this project and is acting on behalf of itself and County.

3. Project follows an alignment which is consistent with City's Rossi-Rico Land Use Plan, which calls for the southerly terminus of Boronda Road (which basically follows a north-south direction) to be located at a point on the north side of the SP tracks, and for the closure of the Boronda Road grade crossing.

4. Project offers superior service and function to the motoring public and emergency vehicles than the Boronda Road grade crossing.

5. Project will result in the saving of substantial amounts of motor vehicle fuel and overall travel distance for the motoring public as compared to the Boronda Road grade crossing and the adverse travel distance it requires.

6. Project will serve the same traffic corridor as the Boronda Road grade crossing.

7. Project provides a convenient and logical north-south traffic corridor, as compared to the Boronda Road grade crossing.

8. Project will provide superior access to the Rossi-Rico area of the City of Salinas, as well as to other surrounding neighborhoods, as compared to the Boronda Road grade crossing.

9. The Rossi-Rico area is planned for substantial residential and commercial growth and a substantial investment in development planning and in public and private improvements has already occurred in this area.

10. Project will substantially enhance the safety of the motoring public in crossing over the SP tracks by enabling it to do so at a separated grade, thereby avoiding the potential of vehicle-train accidents which exists at the Boronda Road grade crossing.

11. Project will substantially aid in reducing traffic congestion on West Market Street and at the Main Street Underpass (which is located approximately 1.3 miles to the east of the proposed grade separation structure).

12. Project will directly result in the elimination of the Boronda Road grade crossing, PUC No. E-116.7, which is located approximately 2,300 feet westerly of the point of crossing of the proposed grade separation structure.

13. The Boronda Road grade crossing is located within a reasonable distance of the point of crossing of the proposed grade separation structure.

14. Project falls within the classification contemplated by Section 1202.5(b) of the Public Utilities Code.

15. Project will benefit SP in that it will enable it to avoid the potential vehicle-train conflict that exists at the Boronda Road grade crossing, and will enable it to utilize the area more effectively for train switching movements.

16. SP has four existing tracks in place at the site of the proposed grade separation structure, and has requested that the bridge structure that will cross over its tracks be of sufficient length to accommodate the installation of three additional tracks in the future. Applicant is willing to provide the space for the three future tracks and such space should be provided. This will also benefit SP.

17. A feasible hypothetical grade separation project located on an alignment at or immediately adjacent to Boronda Road has been reviewed. While engineering details of these various alternatives were not fully developed, it is evident that any grade separation alignment along or adjacent to Boronda Road would be substantially inferior to the Davis Road alignment from the standpoint of public convenience and necessity.

18. An alignment along or adjacent to Boronda Road would not only offer inferior service and function to the motoring public, but to emergency vehicles as well.

19. An alignment along or adjacent to Boronda Road would be inconsistent with the Rossi-Rico Land Use Plan of City.

20. An alignment along or adjacent to Boronda Road would result in a substantial waste of motor vehicle fuel

and adverse travel distance to the motoring public, as compared to the Davis Road alignment.

21. The project has been placed on the 1979-80 annual priority list established by the Commission pursuant to the provisions of Section 2452 of the Streets and Highways Code.

22. The project is in Priority Position Number 22 as set forth in PUC Decision No. 90399, dated June 5, 1979.

23. Pursuant to PUC Decision No. 90399, the Boronda Road grade crossing has been found to be urgently in need of elimination or separation.

24. SP was represented in the nomination hearings which were held in 1979 and which culminated in PUC Decision No. 90399. SP did not object to the nomination of the project by City, and SP did not request that the hearings be reopened or that a rehearing be set with respect to this project.

25. On January 28, 1980, City, acting as lead agency for this project, approved a Final Environmental Impact Report with respect to the project. Applicant filed a Notice of Determination in accordance with the California Environmental Quality Act. This notice and the Final Environmental Impact Report have been filed with the Commission.

26. The Commission has considered Applicant's Final Environmental Impact Report and finds that the benefits of the proposed project outweigh any adverse effects, and that the proposed project should be approved.

27. Inasmuch as this project falls under Section 1202.5 (b) of the Public Utilities Code, 10 percent of the cost of

construction should be apportioned against the railroad. The remainder of the construction costs should be borne by City. The project cost should be defined as the cost of that portion of the project described as follows:

a. The removal and closure of the existing Boronda Road Grade Crossing, PUC No. E-116.7, and the cul-de-sac and barricades required in connection therewith.

b. The northerly approach roadways, supporting embankments, and appurtenances of the Davis Road Overhead extending to the northerly end of the sag vertical curve at or about Station 113 + 50. For right-of-way costs, the amount shall be determined by prorating the area required south of said Station 113 + 50, as related to the total area to be acquired between the SP's existing northerly right-of-way line and West Rossi Street.

c. Relocation of the Monterey County Flood Control and Water Conservation District Canal.

d. The two bridge structures, one spanning West Market Street and the second spanning the SP tracks and right-of-way.

e. All approach roadways, embankments, and appurtenances, southerly of the Davis Road Overhead structure, extending to Station 96, except that work associated with Ramps C and D, which do not carry traffic across the railroad, shall be excluded.

f. For right-of-way cost south of West Market Street, 51 percent of the net cost of the rights-of-way required for the total grade separation project and the

several loops and approach roadways between the north line of Via Maria on the south and the existing state-owned right-of-way of Route 183 along West Market Street.

g. Pavement widening along West Market Street, as necessary to provide channelized left turn pockets to Ramps A and B and temporary detours, as needed to carry traffic through construction.

h. Railroad work, flagging, adjustment of trackage, adjustment to signal and communication lines, and the like, all as may be described in a subsequent Railroad Agreement.

28. Maintenance cost of the elevated structure, including abutments, piers, superstructure, and approach embankments, should be borne by City. SP should be responsible for the cost of maintenance of railroad track, longitudinal drainage, and all railroad facilities.

29. Following completion and opening to traffic of the Davis Road Overhead, the existing Boronda Road grade crossing, PUC No. E-116.7, should be abandoned and physically barricaded to public traffic.

30. Clearances should be in accordance with General Order 26-D. Walkways should conform to General Order 118.

31. Construction plans of the proposed project should be submitted by City to SP for its technical review and should be filed with the Commission prior to commencing construction.

32. Changes incorporated into the project which mitigate the significant impacts are the responsibility of City. Such changes should be adopted by City.

Conclusions of Law

1. The proposed project falls within the classification established by Section 1202.5(b) of the Public Utilities Code.

2. The application for an Order to Construct the project and the request for an apportionment of ten percent (10%) of the cost thereof to SP should be granted.

3. In view of the need of the city of Salinas to obtain an order immediately in order to receive an allocation of funds from the Grade Separation Fund Program this fiscal year, this order will be effective immediately.

ORDER

IT IS ORDERED that:

1. The city of Salinas is authorized to construct the Davis Road Overhead (PUC E-117.2-A) at separated grades across the tracks of the Southern Pacific Transportation Company, all as set forth in the findings of this decision.

2. Ten percent of the cost of the project, as defined in the findings, shall be apportioned against the Southern Pacific Transportation Company, and the remainder thereof shall be borne by the city of Salinas.

3. Within thirty days after completion of construction pursuant to this order, the city of Salinas shall so advise the Commission in writing.

4. This authorization shall expire if not exercised within three years unless time be extended or if the above conditions are not complied with. Authorization may be revoked or modified if public convenience, necessity, or safety so require.

The effective date of this order is the date hereof.

Dated March 18, 1980, at San Francisco, California.

JOHN E. BRYSON
President

VERNON L. STURGEON
RICHARD D. GRAVELLE
LEONARD M. GRIMES, JR.
Commissioners

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

Appendix D

Decision No. 91891, June 3, 1980

Before the Public Utilities Commission
of the State of California

Application No. 59126

(Filed September 6, 1979)

Application of the City of Salinas for an order authorizing construction of a crossing at separated grades between Davis Road and the tracks of the Southern Pacific Transportation Company, sometimes referred to as the Davis Road Overhead, PUC No. E-117, 23-A.

ORDER DENYING REHEARING AND MODIFYING DECISION NO. 91469

The Southern Pacific Transportation Company (SP) has filed a petition for rehearing of Decision No. 91469, issued March 18, 1980. The Commission has considered each and every allegation raised therein, and is of the opinion that sufficient grounds for rehearing have not been shown. Rehearing will therefore be denied.

In addition, the City of Salinas (City) has filed a petition for modification of Decision No. 91469 in several particulars, pursuant to Rule 43 of the Commission's Rules of Practice and Procedure. The modifications sought by the City would explicitly grant it the authority to enter upon SP's right of way to effectuate construction.

We have carefully considered the arguments of both parties on this issue, and have come to the conclusion that Decision No. 91469, issued pursuant to our exclusive authority over grade separation projects, should be modified. This decision has authorized construction of the Davis Road Overhead. Inherent in this authorization, we believe, is authorization to the City to enter onto so much of SP's right of way as it must to carry out the construction we have authorized. This authorization became effective the same date as the order authorizing construction, i.e., March 18, 1980. We are of the opinion that this authorization to enter is not only a necessary and logical concomitant of an order authorizing construction, but is supported by legislative enactment as well. Public Utilities Code Section 1204, which discusses grade separation projects, states in pertinent part:

> ". . . The Commission may provide that the physical work of making the grade separation as well as the proceedings for letting contracts therefor, collecting and enforcing the assessments, and making payment for damages and for the acquisition of property shall be done through the agency of the political subdivision in accordance with law. The order of the commission shall authorize the officers of the political subdivision to *enter upon so much of the right of way* of the railroad, interurban railroad, or street railroad as is necessary to effect the physical grade separation." (Emphasis added.)

We do not consider Section 1202.1 to be applicable to the facts of the instant case, despite SP's contrary argument.

A caveat is in order, however. While we view our order authorizing construction of this grade separation project

to contain by implication the authority for the City to enter SP's right of way, this authorization is in the nature of a license. It is not intended to convey any property right to the City, and does not eliminate the necessity for the City to obtain any necessary easements through appropriate eminent domain proceedings.

Despite our view that this authorization pursuant to Section 1204 is inherent in Decision No. 91469, to avoid any confusion on this point, will will modify that decision to explicitly recognize the operation of that statute.

IT IS THEREFORE ORDERED that rehearing of Decision No. 91469 is hereby denied.

IT IS FURTHER ORDERED that Decision No. 91469 is modified by adding the following paragraph:

> Pursuant to Public Utilities Code Section 1204, the City of Salinas is authorized to enter upon so much of the right of way of SP as is necessary to effect the physical grade separation.

The effective date of this order is the date hereof.

Dated June 3, 1980, at San Francisco, California.

John E. Bryson
President

Vernon L. Sturgeon
Richard D. Gravelle
Leonard M. Grimes, Jr.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

Appendix E

Decision No. 92299

Oct. 8, 1980

Before the Public Utilities Commission
of the State of California

Application of the City of Salinas for an order authorizing construction of a crossing at separated grades between Davis Road and the tracks of the Southern Pacific Transportation Company, sometimes referred to as the Davis Road Overhead, PUC No. E-117, 23-A.

Application No. 59126

(Filed September 6, 1979)

ORDER DENYING REHEARING AND MODIFYING DECISION NO. 91891

A petition for rehearing of Decision No. 91891 has been filed by Southern Pacific Transportation Company (SP). We have considered all of the allegations raised in the petition, and are of the opinion that good cause for granting rehearing has not been shown. However, the petition has raised certain areas of ambiguity or omission which we will correct through the modifications set forth below. Therefore,

IT IS ORDERED that Decision No. 91891 is modified in the following particulars:

A. The first full paragraph on page 2 is deleted and the following language substituted:

"A caveat is in order, however. While we view our order authorizing construction of this grade separation project to contain by implication the authority for the City to enter SP's right of way, this authorization is not intended to convey any property right to the City, and does not eliminate the necessity for the City to obtain any necessary easements or other property rights through appropriate condemnation proceedings. However, we also do not intend it to preclude SP from filing an action in inverse condemnation with this Commission, or, for that matter, with a Superior Court, for any damages alleged to be sustained by the City's entry upon SP's right of way, and will give full consideration to such a petition if filed with this Commission."

B. The following Conclusions of Law are added:

1. Sections 1201 and 1202 of the Public Utilities Code give this Commission the exclusive authority over approval of new or elimination of existing grade separation projects.

2. Section 1202.1 is not applicable to this case, where the Commission has issued a final order authorizing construction of a grade separation project.

3. Section 1204 allows the Commission, upon approval of a grade separation project applied for by a political subdivision, to authorize that political subdivision to do the physical work of the project, and to authorize its officers to enter upon so much of the right of way of the railroad as is necessary to effect the physical grade separation.

4. The authorization to enter the railroad's right of way as provided in Section 1204 inheres in any final order of the nature described above.

5. The authorization to enter the railroad's right of way as provided in Section 1204 does not eliminate the necessity for the applicant to obtain any necessary easements or other property rights through appropriate condemnation proceedings, nor does it preclude the affected railroad from filing an inverse condemnation action with the Commission or a Superior Court for damages alleged to be sustained upon the applicant's entry, if the aforementioned eminent domain proceedings have not properly been instituted, or if the railroad is of the opinion that for some other reason, filing such an action is appropriate.

IT IS FURTHER ORDERED that rehearing of Decision No. 91891 as modified herein is hereby denied.

The effective date of this order is the date hereof.

Dated Oct. 8, 1980, in San Francisco, California.

John E. Bryson
President

Vernon L. Sturgeon
Richard D. Gravelle
Leonard M. Grimes, Jr.

Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.

Appendix F

S.F. No. 24234

In the Supreme Court
of the
State of California

Southern Pacific Transportation Company, a corporation,
Petitioner,

vs.

The Public Utilities Commission of the State of California,
Respondent,

City of Salinas,
Real Party in Interest.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed May 27, 1981]

Notice is hereby given that Southern Pacific Transportation Company, the Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of California entered in this action on February 18, 1981, denying the Petition for Writ of Review with respect to decisions of the Public Utilities Commission of the State of California, with respect to which this Court denied a Petition for Rehearing on March 18, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: May 27, 1981.

Harold S. Lentz
Southern Pacific Building
One Market Plaza
San Francisco, CA 94105
Attorney for Southern Pacific
Transportation Company.

AFFIDAVIT OF SERVICE BY MAIL

State of California
City and County of San Francisco

The undersigned being duly sworn, deposes and says:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years, a citizen of the United States and not a party to the within entitled action. My business address is Southern Pacific Building, One Market Plaza, San Francisco, California 94105. On May 27, 1981, I served the attached Notice of Appeal to the Supreme Court of the United States on the attorneys of record for the Respondent and the Real Party in Interest in this action, by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Janice E. Kerr
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Commission for the State of California
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James M. Del Bene

Subscribed and sworn to
before me this 27th day
of May, 1981
Catherine B. Lundy (Notarial Stamp)
NOTARY PUBLIC—CALIFORNIA
Principal Place of Business in
City and County of San Francisco

My Commission Expires October 8, 1983

Appendix G

Miscellaneous Provisions of the Constitutions of the United States and the State of California and the Public Utilities Code of the State of California

Amendment XIV of the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III of the California Constitution:

§ 3.5. [Limitation on powers of administrative agencies]

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the en-

forcement of such statute is prohibited by federal law or federal regulations.

Article XII of the California Constitution (as restated):

§ 1. [Public Utilities Commission—Membership and terms —Vacancies—Removal]

The Public Utilities Commision consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.

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§ 3. [Utilities subject to legislative control]

Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

§ 4. [Rate-fixing—Discrimination—Judicial review]

The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or dis-

criminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

§ 5. [Legislative power]

The Legislature has a plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

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§ 9. [Construction of Article]

The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change.

Public Utilities Code of the State of California:

§ 1201. Construction of roads or tracks across railroad tracks: Authority to grant or refuse permission

No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade, nor shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corpora-

tion at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission. This section shall not apply to the replacement of lawfully existing tracks. The commission may refuse its permission or grant it upon such terms and conditions as it prescribes.

§ 1202. Exclusive powers of commission

The commission has the exclusive power:

(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by railroad or vice versa.

(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the state, county, city, or other political subdivision affected.

§ 1202.1. Same: Procedure where application states that parties are not in agreement as to apportionment of costs, but applicant is willing to advance money for completion of work: Hearing and decision: Order for immediate possession: Credits against applicant's share of costs

In any proceeding under Section 1202, where the application to the commission states that the parties are not in agreement as to apportionment of costs, but the applicant is willing to advance the amount of money reasonably necessary to enable the respondent to complete the work which must be done by it, the commission shall set the application for hearing as soon as its calendar permits on the questions of (a) the necessity for the project, (b) the approval of the location and the engineering plans, including provisions for handling traffic during construction and the work to be performed by each party, and (c) the sum to be advanced by the applicant for the work to be done by the respondent. The commission shall render as promptly as possible an interim decision effective within twenty (20) days on said questions, reserving for later hearing and decision the question of apportionment of costs. Said decision shall also order the respondent to proceed upon receipt of the sum to be advanced by applicant without delay to perform the work to be done by respondent, integrating such work with that of the applicant or its contractor in such manner that neither will unreasonably obstruct or delay the work of the other, to the end that the people of the State may have the use of the project at the earliest possible date.

In the event of the failure or refusal of the respondent to grant a right of entry to permit the applicant to proceed with the work to be performed by it or its contractor, applicant may, pursuant to Section 14 of Article I of the Constitution, obtain an order of immediate possession in a court of competent jurisdiction if a condemnation action has previously been filed in such court, or file such action and obtain an order of immediate possession in the event such action has not previously been filed, and upon obtaining such order, may proceed in the same manner as if a right of entry had been granted, and thereupon the same duties to proceed with respondent's own work and integrate the same with that of applicant or its contractor, shall fall upon respondent.

In the final decision apportioning costs, the sum advanced by the applicant shall be credited against the applicant's share of said costs. In said final decision there shall also be credited against applicant's share of the costs any increases in said costs found by the commission to be directly attributable to respondent's wilful failure or refusal, after the effective date of such interim decision, to proceed with its own work or to integrate said work with that of applicant or its contractor.

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§ 1204. Assessments against districts for special benefits: Provisions for doing of work: Authority of officers to enter right of way

If the legislative body of the political subdivision determines that special benefits will accrue from the separation

of grades to one or more districts within the political subdivision, and has made a finding to that effect and that the cost thereof, other than the portion to be paid by the railroad, interurban railroad, or street railroad involved, should be paid by such district or partly by the district and partly by the political subdivision, the commission may provide that such proportion of the total cost of the separation of grades, including the acquisition of property and the damage to property or an interest therein, as is not payable by the owners of the railroad, interurban railroad, or street railroad involved, may be assessed upon the district or that a part thereof may be paid by the district and a part by the political subdivision in accordance with the finding of the legislative body of the latter. The commission may provide that the physical work of making the grade separation as well as the proceedings for letting contracts therefor, collecting and enforcing the assessments, and making payment for damages and for the acquisition of property shall be done through the agency of the political subdivision in accordance with law. The order of the commission shall authorize the officers of the political subdivision to enter upon so much of the right of way of the railroad, interurban railroad, or street railroad as is necessary to effect the physical grade separation.

§ 1205. Modification of order

If any order of the commission provides for the payment of a portion of the cost of any such grade separation by a political subdivision without authorizing the assessment of all or any part thereof upon a benefited district, the legislative body of the political subdivision may at any time

thereafter apply to the commission to have the order modified in accordance with any finding made by the legislative body, and the commission may thereupon make a new or modified order in the same manner as if such application had been made to it before the making of the order.

§ 1206. Commission's power to fix just compensation

The commission may fix the just compensation to be paid for property or any interest in or to property to be taken or damaged in the separation of grades at any crossing specified in Section 1202, or for property or any interest in or to property to be taken or damaged in the construction, alteration, or relocation, under the order or with the approval of the commission, of elevated tracks or subways for any railroad or street railroad over or under any public road, street, highway, or private right of way, or of any public road, street, or highway over or under the tracks of any railroad corporation or street railroad corporation, and upon the payment of the compensation so fixed may make a final order of condemnation.

§ 1207. Same: Manner of commencement of proceedings: Contents of order and petition: Verification of petition: Filing of copies

Proceedings under Section 1206 may be commenced by order on the commission's own motion or by a petition filed by the State, county, city and county, city, political subdivision, railroad corporation, or street railroad corporation affected. Any such proceeding may be made a part of any proceeding commenced under Sections 1202 to 1205, inclusive.

The petition shall set forth the name and interest of the petitioner. The order on the commission's own motion and

the petition shall set forth (a) a statement of the purpose of the proceedings and the use for which property or interest in or to property is sought to be taken, (b) a description of each piece of land or other property or interest in or to property sought to be taken, and whether it includes the whole or only a part of an entire parcel or tract or piece of property or interest in or to property, and (c) the names and addresses of all owners and claimants thereof, if known, or a statement that they are unknown, and a statement of each railroad corporation, the State and political subdivision which in the opinion of the commission or the petitioner has an interest in the proceeding.

The petition shall pray (a) that the commission fix the just compensation to be paid for the acquisition of or damage to the property and interest in or to property specified in the petition, (b) that the commission designate the party or parties to the proceeding who shall pay such compensation and the owners and claimants of the property and interest in or to property condemned to whom such compensation shall be paid, and (c) that the commission make its final order of condemnation. When the proceeding is commenced by order on the commission's own motion such matters shall be included in the statement of the purpose of the proceeding.

The petition shall be verified. At the time it is filed with the commission the petitioner shall also file additional copies thereof equal in number to three more than the number of owners and claimants named in the petition.

§ 1208. Same: When commission to make order to show cause: Contents of order: Incorporation of order to show cause in order on commission's own motion

Upon the filing of the petition or the making of the order on the commission's own motion, the commission shall make its order to show cause. The order shall (a) specify the nature of the proceeding, (b) contain a general description of the property and interest to be condemned, and (c) direct the owners and claimants and the railroad corporations, street railroad corporations, and governmental authorities in interest named in the petition or order on the commission's own motion, who shall also be named in the order to show cause, to appear before the commission at a time and place specified in the order, to show cause, if any they have, why the commission should not proceed after hearing to fix the just compensation to be paid for the acquisition of or damage to the specified property and interest, to designate the party or parties to the proceedings who shall pay such compensation and the owners and claimants to whom such compensation shall be paid, and to make its final order of condemnation.

The order to show cause shall direct the secretary of the commission to serve or cause to be served upon each owner and claimant, railroad corporation, street railroad corporation, and governmental authority in interest a copy of the order certified under the seal of the commission to which shall be attached a copy of the petition or order on the commission's own motion.

When the proceeding is commenced by order on the commission's own motion the order to show cause may be incorporated in the order on the commission's own motion.

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§ 1213. Time and place of hearing: Findings: Time for fixing compensation

At the time and place specified in the order to show cause, or at such other time and place as, for good cause, is otherwise ordered by the commission, the commission shall proceed to a hearing upon the petition or order on the commission's own motion. When the proceeding has been submitted the commission shall make and file its finding upon the question whether the use to which the property or interest therein is to be applied is a use authorized by law and whether the taking is necessary to such use, and shall make and file its written finding fixing the just compensation to be paid for the property or interest. If the commission finds that severance damages should be paid, the just compensation for such damages shall be found and stated separately. The just compensation shall be fixed by the commission as of the day on which the petition was filed or the order on the commission's own motion was made.

§ 1705. Hearings: Subpoenas: Order: Effect of decisions rendered in response to complaints against utilities involving small sums of money

At the time fixed for any hearing before the commission or a commissioner, or the time to which the hearing has been continued, the complainant and the corporation or person complained of, and such corporations or persons as the commission allows to intervene, shall be entitled to

be heard and to introduce evidence. The commission shall issue process to enforce the attendance of all necessary witnesses. After the conclusion of the hearing, the commission shall make and file its order, containing its decision. Except for decisions filed after hearings held under Section 1702.1, the decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. A copy of such order, certified under the seal of the commission, shall be served upon the corporation or person complained of, or his or its attorney. The order shall, of its own force, take effect and become operative 20 days after the service thereof except as otherwise provided by the commission, and shall continue in force either for a period designated in it or until changed or abrogated by the commission. If the commission believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order. Decisions rendered in response to complaints filed and processed pursuant to Section 1702.1 shall not be considered as precedent or binding on the commission or the courts of this state.

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§ 1708. Rescinding, altering, or amending orders or decisions by commission: Effect of such orders or decisions

The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or

decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

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§ 1731. Application for rehearing: Accrual of cause of action arising out of order or decision

After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 20th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 30th day after the date of issuance, or before the 10th day after the date of issuance in the case of an order issued pursuant to Article 5 (commencing with Section 816) and Article 6 (commencing with Section 851) of Chapter 4 of this division relating to security transactions and the transfer or encumbrance of utility property.

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§ 1736. Modification of order: Effect of modified order

If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change, or modify it. The order or decision abrogating, changing, or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

§ 1756. Time for application for review to Supreme Court: Return of writ: Certification of record

Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified.

§ 1757. Introduction of new evidence: Limit of review: Finality of findings and conclusions

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record

of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1758. Parties authorized to appear: Entry of judgment: Applicable procedure provisions

The commission and each party to the action or proceeding before the commission may appear in the review proceeding. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure relating to writs of review shall, so far as applicable and not in conflict with the provisions of this part, apply to proceedings instituted in the Supreme Court under the provisions of this article.

§ 1759. Jurisdiction of courts to review orders or decisions of commission

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or

operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

§ 1760. When Supreme Court to exercise independent judgment on law and facts

In any proceeding where the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

Appendix H

Portion of the Opinion of the California Supreme Court in People v. Western Air Lines, Inc., 42 C.2d 621 (1954), appearing at pages 629-632

"At the outset it is urged by the plaintiff that the prior decision of the commission followed by the order of this court denying a writ of review and the dismissal of the defendant's appeal by the Supreme Court of the United States has resulted in res judicata as to certain issues involved in the present action. These include the determination (1) that the commission had jurisdiction to fix the intrastate fares of the defendant; (2) that the status of the defendant is that of a public utility subject to regulation as contemplated by [629] the Constitution of this state; and (3) that the Civil Aeronautics Act of 1938, as amended, has not deprived this state of the power, through the commission, to regulate the defendant's intrastate fares.

"The determination as to these three questions was made, the plaintiff asserts, in the exercise by the commission of its judicial power, and was and is to that extent as conclusive as would be a final judgment of a court of record.

"Under the Constitution and statutes of this state the commission is possessed of broad and comprehensive powers. It has wide administrative powers. It has legislative powers, such, for example, as the fixing of rates of public utilities, the exercise of which is prospective in operation and legislative in character. (*Southern Pac. Co. v. Railroad Com.*, 194 Cal. 734, 739 [231 P. 28].) That it also possesses judicial powers may not be questioned. (*People v. Lang Transportation Co.*, 217 Cal. 166, 170 [17

P.2d 721].) When its determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings. (Pub. Util. Code, § 1709.) Direct attack is made available by application for writ of review to this court in accordance with the provisions of section 1756 of the Public Utilities Code. We are not herein dealing with a determination of the commission made in the exercise of its judicial power where no direct attack, on constitutional or other grounds, has been made within the time provided by section 1756. However, it seems clear that where those determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties. (*Sunshine A. Coal Co. v. Adkins*, 310 U.S. 381 [60 S.Ct. 907, 84 L.Ed. 1263].)

"Whether the order of the Supreme Court of the United States dismissing the appeal of the defendant "for want of a substantial federal question" is res judicata in that court on the question of alleged federal control of intrastate rates, is not for this court to decide. It is established, however, that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. (*Southern Calif. Edison Co. v. Railroad Com.*, 6 Cal.2d 737, 747 [59 P.2d 808].) This is so even though [630] the order of this court is without opinion (*Napa*

Valley Elec. Co. v. Railroad Com., 251 U.S. 366 [40 S.Ct. 174, 64 L.Ed. 310].) In the last cited case it was held at pages 372 and 373 that a denial by this court of an application for a writ of review is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California"; that the "absence of an opinion by the Supreme Court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company," and that it was a "final judicial determination" and "as effectual as an estoppel as would have been a formal judgment upon issues of fact." (See, also, *Funeral Dir. Assn. v. Board of Funeral Directors & Embalmers*, 22 Cal.2d 104, 107, 108 [136 P.2d 785]; *Southern Calif. Edison Co. v. Railroad Com., supra*, 6 Cal.2d 737, 747; *People v. Hadley*, 66 Cal.App. 370, 375 [226 P. 836]; *Southern Pac. Co. v. Van Hoosear*, 72 F.2d 903; *Consolidated Freightways, Inc. v. Railroad Com.* (1951), 36 F.Supp. 269, 270; *Adams v. Decoto* (1927), 21 F.2d 221.)

"The defendant relies on the case of *Stratton v. Railroad Commission*, 186 Cal. 119, which contains declarations that appear to be contrary to other and later decisions of the courts on the subject. It was said in that case at page 126 that "the commission is not a judicial tribunal in the strict sense." That statement is of course true. The commission is not a judicial tribunal constitutionally established as a part of the judicial department of the state. It is also observed that the commission is in the position of acting

at times as informer, prosecutor, jury and judge in matters coming before it. This takes place, for example, when the commission on its own motion issues an order directing some person, firm or corporation within its regulatory jurisdiction to show cause why it should not be required to perform or not perform a certain designated act or be subject to discipline for performing an act contrary to law or public utility regulation. The proceeding may take on the character of an adversary proceeding in which the commission furnishes evidence, judicially passes upon the competence and weight of that evidence and makes an order based upon it. This kind of establishment was seriously criticized in its early stages by those affected by it. But it is the law that when the system has been duly authorized by the Constitution of the state and the procedure is such as to satisfy the requirements of due process, both state and federal, no valid objection can be made to it. Due process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made. (See *Southern Pac. Co. v. Public Utilities Com.* (1953), 41 Cal.2d 354, 365 [260 P.2d 70]. When the commission has acted and an intersted party is dissatisfied due process is further afforded by the right of petition for a writ of review to this court. And of course no law of this state could deprive a party whose rights were prejudicially affected of the right to apply to the Supreme Court of the United States for relief on federal constitutional grounds."

Appendix I

Portion of the Opinion of the California Supreme Court in Consumers Lobby Against Monopolies v. Public Utilities Com., 25 Cal.3d 891 (1979), appearing at pages 899-905

"At the outset we address a contention that is often presented to us in response to a petition for writ of review, but nevertheless misapplies the authority on which it relies and ignores the realities of our rulings on such petitions. Both the commission and Pacific assert that we have previously decided the issue now before us—i.e., the commission's authority to award attorney fees and costs to public interest participants in its proceedings—and imply that we should follow those decisions under the doctrine of stare decisis. The decisions in question, however, are not embodied in published opinions of this court, but rather in minute orders in which we denied without opinion petitions for writs of review on two occasions several years ago. (*Citizens to Save Fallbrook's Environment v. Public Utilities Com.* (July 31, 1974) S.F. [899] 23067; *Toward Utility Rate Normalization v. Public Utilities Com.* (Oct. 17, 1976) S.F. 23395.) In support of their contention the commission and Pacific then quote the following language of *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630-631 [268 P.2d 723]: "It is established . . . that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. [Citation.] This is so even though the order of this court is without opinion."

"The reliance is misplaced: *Western Air Lines* is not a stare decisis case but a res judicata case, and hence is governed by very different considerations. *Western Air Lines* arose because the commission decided in a proceeding before it that it had jurisdiction over the defendant's intrastate air route, and fixed the rates to be collected for such service; the defendant petitioned this court for writ of review; we denied the petition without opinion, and the United States Supreme Court dismissed the appeal for want of a federal question. The commission then filed a superior court action in the name of the People to recover statutory penalties from the defendant for its prior collection of unauthorized rates. (Pub. Util. Code, §§ 2104, 2107.) The action was dismissed on demurrer, and we reversed the judgment on the commission's appeal.

"Our opinion began by addressing the commission's contention that "the prior decision of the commission followed by the order of this court denying a writ of review and the dismissal of the defendant's appeal by the Supreme Court of the United States has resulted in res judicata as to certain issues involved in the present action," i.e., the commission's jurisdiction to regulate the defendant's intrastate fares. (42 Cal.2d at p. 629.) We recognized that the commission is empowered to make determinations of a judicial nature, and reasoned (at p. 630) that "where those determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between

the same parties." Because the questions relating to the commission's jurisdiction had been resolved in the prior proceeding and the parties in each were essentially the same, we held that the earlier determination was conclusive and "That conclusiveness arises by operation of law." (*Id.* at pp. 632-633.) [900].

"(1) Seen thus in context, the language now relied on by the commission and Pacific—i.e., that our denial of a petition for writ of review is "a decision on the merits both as to the law and the facts presented in the review proceedings"—was an integral part of our res judicata analysis. The sole means provided by law for judicial review of a commission decision is a petition to this court for writ of review (Pub. Util. Code, § 1756), which thereby serves in effect the office of an appeal. If our ruling on such a petition were not a final "decision on the merits both as to the law and the facts presented," the parties would be denied their right to such review. Because it must therefore be deemed a decision on the merits, our denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies. (2) (See fn. 3.) This was the rule long before *Western Air Lines (Napa Valley Elec. Co. v. R. R. Comm.* (1920) 251 U.S. 366, 371-373 [64 L.Ed. 310, 313, 40 S.Ct. 174]), and it is still the rule today (see, e.g., *Pacific Tele. & Tel. Co. v. P.U.C. of State of Cal.* (9th Cir. 1979) 600 F.2d 1309)[2]

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[2]This reasoning distinguishes the cases involving the prerogative writs such as prohibition and mandate. Because the law does provide other means of judicial review in such cases, appellate courts have discretion to summarily deny petitions for those writs on policy grounds unrelated to their procedural or substantive

"The commission and Pacific do not urge that either of the prior cases they rely on bar the present litigation on the ground of res judicata; nor could they properly do so, for the causes of action here asserted—i.e., the particular claims of CLAM and TURN for attorney fees and costs in their respective proceedings before the commission—are not the same as those asserted in the prior cases. (3) One of the litigants now before us (TURN) was, however, a party to one of the prior decisions (S.F. 23395); as to such a party the prior decision may, in appropriate [901] circumstances, have the limited res judicata effect known as collateral estoppel. (See generally *Clark v. Lesher* (1956) 46 Cal.2d 874, 880-881 [299 P.2d 865], and cases cited.) It could therefore be contended that TURN is estopped to relitigate the issue of the commission's jurisdiction to award attorney fees and costs to the extent that such issue

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merits. It follows that an order denying such a petition without opinion is not res judicata. (See, e.g., *People v. Medina* (1972) 6 Cal.3d 484, 488-492 [99 Cal.Rptr. 630, 492 P.2d 686] [denial of petn. for writ of prohibition to review order refusing to suppress evidence]; *Hagan v. Superior Court* (1962) 57 Cal.2d 767, 770 [22 Cal.Rptr. 206, 371 P.2d 982] [denial of petn. for writ of mandate to review discovery order]; *Funeral Dir. Assn. v. Bd. of Funeral Dirs.* (1943) 22 Cal.2d 104 [136 P.2d 785] [denial of petn. for writ of mandate filed in first instance in Supreme Court]; see also *State Bd. of Equalization v. Superior Ct.* (1942) 20 Cal.2d 467, 470-471 [127 P.2d 4].) An exception has been recognized "when the sole possible ground of denial was on the merits or it affirmatively appears that the denial was intended to be on the merits." (*People v. Medina, supra,* at p. 491, fn. 6, of 6 Cal.3d.) And in any case in which the court issues an alternative writ and renders a written decision granting or denying relief, that decision has ordinary res judicata effect. (See, e.g., *Overstreet v. County of Butte* (1962) 57 Cal.2d 504, 506 [20 Cal.Rptr. 631, 370 P.2d 335] [prohibition]; *Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 733 [13 Cal.Rptr. 104, 361 P.2d 712] [mandate].)

was actually decided in the earlier proceeding. But when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 230 [123 Cal.Rptr. 1, 537 P.2d 1250]; *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 757-758 [22 Cal.Rptr. 14, 371 P.2d 758].) Both considerations are present in this case. If we were to decide that the commission has jurisdiction to award attorney fees and costs to public interest participants situated similarly to TURN, it would be unjust to deny the possibility of such compensation to TURN solely by reason of the doctrine of collateral estoppel. And because the sole *raison d'etre* of TURN and similar litigants is to represent the public interest, that same interest will evidently be promoted by a correct resolution of this significant question of law.

"(4) For different reasons we also conclude the prior cases invoked by the commission and Pacific should not be given stare decisis effect. The doctrine of stare decisis applies only to judicial precedents, i.e., to the ratio decidendi or actual ground of decision of a case cited as authority (*Hart v. Burnett* (1860) 15 Cal. 530, 598-599.) It follows, of course, that a case is not authority for a point that was not actually decided by the court. (*Ibid.*; accord, *In re Tartar* (1959) 52 Cal.2d 250, 258 [339 P.2d 553], and cases cited.) The ratio decidendi of an appellate decision is ordinarily discovered by examining the opinion of the court. But we deal here, by definition, with cases in which this court rendered its decision without opinion, summarily denying petitions for writs of review. By relying on such

cases as authority for points of law, the commission and Pacific imply that our ratio decidendi in each instance was necessarily a ruling on the substantive grounds presented by the writ and answer. The code itself demonstrates this is not so.

"First, we are required to deny the entire petition on procedural grounds if certain prerequisites to our jurisdiction are not met. This will occur, for example, if prior to filing in this court the petitioner failed to apply to the commission for a rehearing (Pub. Util. Code, § 1731; compare Gov. Code, § 11523 [contrary rule under Administrative [902] Procedure Act]), or if the petitioner so applied but the application was denied by the commission on the ground that it was not timely filed (Pub. Util. Code, § 1731), or if the petitioner failed to apply to this court for a writ within the time specified by law (*Id.*, § 1756). In none of these instances, obviously, is our decision based on substantive grounds.

"Secondly, many if not most petitions for writ of review attack the action of the commission on multiple grounds. Yet the code prohibits the petitioner from relying on any ground that he did not set forth in his petition for rehearing before the commission. (*Id.* § 1732.) If he persists in presenting such an issue to us in disregard of the statute, we are required to reject it for that reason alone. It follows that as to any such issue our denial of the petition is a decision on procedural grounds alone.

"Moreover, general principles of law governing judicial review of administrative proceedings may also require us to deny an entire petition for writ—or reject a particular ground thereof—without reaching its substantive issues.

Thus if the petitioner presents a question that he could have litigated before the commission but did not, we are barred from addressing it by the doctrine of exhaustion of administrative remedies. (See generally *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291-296 [109 P.2d 942, 132 A.L.R. 715].)

"The petition may come too late in another sense: when the issue raised by the petitioner is rendered moot by supervening events, the court will ordinarily deny the application for that reason. (See, e.g., *Cline v. Industrial Acc. Com.* (1931) 116 Cal.App. 439, 440 [2 P.2d 840].) It is true that in exceptional instances the court may nevertheless choose to address the issue if sufficient private rights (e.g., *Hall v. Scudder* (1946) 74 Cal.App.2d 433, 438 [168 P.2d 990]) or public interests (e.g., *Ballard v. Anderson* (1971) 4 Cal.3d 873, 876-877 [95 Cal.Rptr. 1, 484 P.2d 1345, 42 A.L.R.3d 1392]; *DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58 [13 Cal.Rptr. 663, 362 P.2d 487]) are at stake. It cannot do so, however, without taking the case; thus if it denies the petition without opinion when the issue is shown to be moot, it must be presumed to have acted on that ground.

"On the other hand, the petitioner may bring his case before us too soon. Although the code appears to permit the filing of a petition for rehearing and hence a petition for review after "any order or decision" of [903] the commission (Pub. Util. Code §§ 1731, 1756), the commission frequently resists issuance of the writ on the ground the application is premature. It argues that the order or decision under attack is merely an interlocutory ruling—a step in a larger, ongoing proceeding not yet finally resolved by the commission—and therefore is not ripe for judicial

review. While the legal principle is settled (see, e.g., *Gumilla v. Industrial Acc. Com.* (1921) 187 Cal. 638, 639-640 [203 P. 397]), the question of when a commission action is sufficiently final for purposes of judicial review is often perplexing to the court. It is clear, however, that each time we deny all or part of a petition for lack of ripeness, we do not adjudicate its substantive issues.

"Finally, although standing to apply for judicial review in this court is accorded by the code to all parties to the proceedings before the commission and all person "pecuniarily interested" in the public utility in question (Pub. Util. Code, §§ 1731, 1756), we will deny the petition without reaching substantive issues when it appears that for any reason the applicant was not in fact aggrieved by the action of the commission. This result follows, for example, if the alleged harm is merely speculative (e.g., *E. Clemens Horst Co. v. Railroad Com.* (1917) 175 Cal. 660 [166 P. 804]), if the petition is in effect seeking declaratory relief (e.g., *C. A. Hooper & Co. v. Railroad Com.* (1917) 175 Cal.811 [165 P. 689]), or if the petitioner is not a member of the class to which the principle contended for would apply.[4] [904]

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[4]This was the case, for example, in one of the prior denials of writs of review relied on herein by the commission and Pacific as stare decisis. (*Citizens to Save Fallbrook's Environment v. Public Utilities Com.* (July 31, 1974) S.F. 23067.) There the petitioner, a local public-interest group, sought to prevent commission approval of a utility's proposal to build an electric power transmission line across a scenic area. Initially the petitioner prevailed, and the commission issued a decision ordering the utility to adopt an alternate route proposed by the petitioner. The petitioner filed a motion for attorney fees. Thereafter, however, the commission reopened the case (Pub. Util. Code, § 1708), took additional evidence, and issued a new decision in which it approved the route originally

"In short, although a summary denial by this court of a petition for writ of review is "a decision on the merits" for res judicata purposes (*Western Air Lines*), it is not stare decisis. As we have seen, the merits of the decision may well be procedural rather than substantive; yet because there is no opinion, its ratio decidendi does not appear on its face. It would therefore be sheer speculation for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary: members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case allegedly raising the same question.

"For the foregoing reasons, the prior cases relied on herein by the commission and Pacific are neither binding nor persuasive on the issue now before us."

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proposed by the utility. The commission also denied the petitioner's request for attorney fees.

After denial of rehearing the petitioner applied to this court for a writ of review, attacking both the lawfulness of the second decision and the denial of attorney fees. On the latter point the petitioner contended it should be compensated for its efforts because it assertedly vindicated the public policy of preserving the environment and thus obtained a substantial benefit for the cittizenry at large. The commission responded by defending its second decision and denying it had authority to award attorney fees. In ruling on the petition, however, we did not need to reach the latter issue: because we concluded that the second commission decision—approving the route proposed by the utility—was lawful, the petitioner ipso facto was not a prevailing party in the case. It had therefore conferred no benefit whatever on the public, and its request for attorney fees could be rejected without reaching the issue of the commisssion's authority to make such an award.

No. 80-2131

In the Supreme Court

OF THE

United States

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
CLERK

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

VS.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

MOTION TO AFFIRM OR DISMISS

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Real Party in Interest.

MOTION TO AFFIRM OR DISMISS

Appellee (hereinafter, "the Commission") moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of California, on the grounds that said judgment is based upon adequate state grounds and that the appeal does not present a substantial federal question.

I

OPINIONS BELOW

The opinions below are correctly stated in Appellant's (hereinafter, "Southern Pacific") Jurisdictional Statement.[1]

II

ARGUMENT

A. The Decisions Below Rest Upon Adequate State Grounds

It is important to note that the Commission decisions at bar involved rights and procedures created by state statutes, *viz.*, Public Utilities Code Sections 1201, et seq. (See Appendix G, Jur. St.) The interpretation and operation of those statutes is the exclusive responsibility of the California courts and this Commission. *Speiser v. Randall*, 357 U.S. 513, 523 n.7 (1957), *rehearing denied*, 358 U.S. 860 (1958); *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U.S. 445, 448 (1921); also, *Greyhound Lines, Inc. v. Public Utilities Commission*, 68 Cal.2d 406 (1968). The denial of review and rehearing by the state supreme court fully affirms that the Commission's interpretations of the dispositive provisions of the Public Utilities Code were proper in light of state law. *People v. Western Airlines, Inc.*, 42 Cal.2d 621, 630-631 (1954). The actions of the court below establish that Southern Pacific's claims respecting alleged violations of its rights to substantive and procedural due process are not legitimate.

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[1]References to the Jurisdictional Statement hereinafter made shall be abbreviated as "Jur. St.", followed by a page citation.

As to Southern Pacific's substantive due process claim, the Commission left the door open to a motion by Southern Pacific, in the event that the City of Salinas (Salinas) failed to diligently file its own condemnation action, requesting that the Commission proceed to adjudicate the just compensation question. (See Decision No. 91891, as modified by Decision No. 92299, Appendices D and E, Jur. St.) The record before the Commission demonstrates that Southern Pacific's rights to just compensation have been fully protected and preserved. Furthermore, Salinas continues to acknowledge its ultimate liability to Southern Pacific. No prejudice to Southern Pacific's property interests as protected by constitutional principles of substantive due process can be asserted in the light of these circumstances. All that has thus far been accomplished is the granting of authority to construct a railroad crossing with all of the trappings attendant to such authority. These acts must logically precede any action to fix just compensation since the fact of taking or damage of property may be precluded if authority to construct is denied. The sequence of the statutes here at bar fully support this result. See especially Public Utilities Code Section 1206, which presumes the approval of construction; *Great Northern Ry. Co. v. Superior Court*, 126 Cal.App. 575, 583, (1932); *Northwestern Pacific R.R. Co. v. Superior Court*, 34 Cal.2d 454, 458 (1949).

More importantly, Southern Pacific fails to allege that the pertinent statutes, Public Utilities Code Sections 1201, et seq., as a constitutional matter, impermissably allow damage to its property rights. To the contrary, Southern Pacific argues its disagreement with the Commission's

interpretation of those statutes, a disagreement with which the state court below was unimpressed. It is submitted that no proper federal question has been raised by Southern Pacific.

Turning to Southern Pacific's procedural due process allegations arising from the modifying language of Decision No. 91891, the Commission submits that Southern Pacific has been afforded a full "opportunity to be heard." It is important to keep in mind that the principal holding at issue is the Commission's determination that Salinas was accorded a right of entry as a necessary incident to the approval of the Davis Road construction project. With respect to that determination, Southern Pacific filed an extensive petition for rehearing on July 1, 1980, and a reply to the subsequent brief of Salinas on July 25, 1980. The issues addressed therein were purely legal; in those pleadings Southern Pacific never alleged that the convention of a hearing was necessary for the taking of additional factual evidence. Thus, no apparent purpose would have been served by the granting of a rehearing. Procedural due process does not require idle acts of a tribunal. *City of Los Angeles v. Public Utilities Commission,* 15 Cal.3d 680, 703 (1975).

B. The Denial Of Southern Pacific's Petitions For Writ Of Review And Rehearing By the Supreme Court Of The State of California Does Not Raise Any Federal Question

Southern Pacific once again raises the question of the adequacy of judicial review afforded to it under California

statute.[2] Having been thrice denied a review by the Supreme Court of the State of California with respect to Application No. 59126, Southern Pacific attempts to characterize that honorable court's opinion in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979), as the sole source of its frustrations.

Reduced to their basic element, Southern Pacific's contentions represent nothing more than a disagreement with the California Supreme Court as to the merit of the petitions Southern Pacific presented to that court. Southern Pacific fails to heed the clear message of the minute orders set forth in Appendices A and B, Jur. St., *viz.*, that its petitions failed to set forth sufficient grounds for the granting of review. Implicit in that message is the finding that the Commission's orders there challenged were in compliance with apposite state statutes and regulatory law.[3] *People v. Western Airlines, Inc.*, 42 Cal.2d 621 (1954), *Consumers Lobby, supra* at 901.[4] Southern Pacific now appears before this Court having been unable to persuade the tribunals below that its claims are compelling or its cause just; however, the fact that a litigant has suffered defeat hardly proves a deprivation of constitutional rights or the caprice of the tribunal whose decision has adversely affected the litigant. See *Napa Valley Electric Co. v. Railroad Com-*

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[2]This identical issue was raised by Southern Pacific in a related case, No. 80-932, described in footnote 7, Jur. St. 4.

[3]See Argument "A", *supra*.

[4]Inasmuch as none of the procedural defects discussed in the *Consumers Lobby* opinion, 25 Cal.3d at 902-905, are pertinent to the instant case, denial of Southern Pacific's petition could only have been for want of substantive merit.

mission, 251 U.S. 367, 372-373 (1920); *Southern California Edison Co. v. Railroad Commission*, 6 Cal.2d 737 (1936).

Nor does the *Consumers Lobby* opinion, of which Southern Pacific vehemently disapproves, give rise to any cause of action sounding in federal constitutional law. Southern Pacific's contention that *Consumers Lobby* cheats litigants of due process and adequate judicial review is the product of a failure to understand the holding which it now attacks.

Consumers Lobby did not significantly alter the nature of the review process described at Sections 1756, et seq. of the Public Utilities Code. The court's holding in that case continued the long-standing rule that denials of petitions for writ of review are to be deemed a decision on the merits. *Consumers Lobby, supra*, at 901. Contrary to the arguments of Southern Pacific, review does not fail adequacy or meaning simply because the court has ruled that no *stare decisis* effect attaches to a denial of a writ of review; that third parties, some of whom may be as yet unborn, suffer no ill effect from the denial raises no constitutional defect. As the state court noted, its decision may have the effect of encouraging petitions for review:

> "[M]embers of the public who have potentially meritorious petitions for review to present to this court [might otherwise] be dissuaded from doing so by the mere fact that we declined to take an earlier case allegedly raising the same question." *Id.*, at 905.

The power to determine the effect which a court's rulings shall have clearly rests within the sound discretion of the court rendering that ruling. *Consumers Lobby* is consistent with the apposite statutory and constitutional principles

of judicial review. Southern Pacific's plea for consideration of the "no *stare decisis*" rule is without legal basis and should be denied.

III

CONCLUSION

Southern Pacific fails to raise any issue not adequately decided below on state grounds or presenting a substantial federal question. Wherefore, the Commission respectfully submits that the instant appeal should be dismissed or, alternatively, the judgment below should be affirmed.

Dated: July 16, 1981
San Francisco, California

Respectfully submitted,
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No. 80-2131

In the Supreme Court

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United States

OCTOBER TERM, 1980

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STATE OF CALIFORNIA,
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CITY OF SALINAS,
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On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Southern Pacific Transportation Company presses the instant appeal after having failed to impress the California Supreme Court with the merits of its Petition for Writ of Review and Petition for Rehearing. In this appeal two main questions are presented. The first question consists of two parts: Did the action of the California Public Utilities Commission (hereinafter the Commission) in granting the City of Salinas a right of entry upon the property of Southern Pacific Transportation Company violate the constraints of Section 1 of the Fourteenth Amendment of the Constitution of the United States? Concurrently, did the California Supreme Court do so when it summarily denied Southern Pacific Transportation Company's petition for review? The second question is whether the decision of the California Supreme Court in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979), with respect to the effect of a denial, without opinion, of a petition for writ of review, passes constitutional muster? This question was raised by Southern Pacific Transportation Company in its previous appeal to this Court (No. 80-932). That appeal was dismissed on February 23, 1981, for want of a substantial federal question.

The City of Salinas, the real party in interest, hereby challenges Southern Pacific Transportation Company's assertion of jurisdiction for the reasons herein given.

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On Appeal From the Supreme Court of the State of California

MOTION TO DISMISS OR AFFIRM

The real party in interest (hereinafter, the City) moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Supreme Court of the State of California, on the grounds that the judgment is based upon adequate state grounds and that the appeal does not present a substantial federal question.

I

OPINIONS BELOW

The opinions below are correctly stated in Appellant's (hereinafter, Southern Pacific) appendices to its Jurisdictional Statement.[1]

II

JURISDICTION

Jurisdiction is asserted by Southern Pacific under Title 28, United States Code § 1257(2). (Jur. St. 6.)

III

ARGUMENT

A. The Decisions Below Rest Upon Adequate State Grounds

The rights which Southern Pacific claims were impinged and the procedures which it asserts were circumvented in the Commission's decisions challenged in this appeal, are creatures of state law set forth in the California Public Utilities Code. It is this body of law that gives substance to and defines the rights and obligations of the parties. In this regard, it is particularly poignant and meaningful to observe that the interpretation, application, and operation of the Public Utilities Code is the exclusive responsibility of the California Supreme Court and the Commission. This is beyond dispute. *Speiser v. Randall*, 357 U.S. 513, 523 n.7

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[1]References herein to Jurisdictional Statement or to appendices thereof, are to Appellant's Jurisdictional Statement or the appendices thereof. "Jur. St." followed by a number or "Jur. St. Appx." followed by a letter and number, refer to pages of the text or appendix on the Appellant's Jurisdiction Statement.

(1957); rehearing denied, 358 U.S. 860 (1958); *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U.S. 445, 448 (1921); *Greyhound Lines, Inc. v. Public Utilities Commission*, 68 Cal.2d 406 (1968). In addition, it is noteworthy that it has been long recognized that denial of a petition for writ of review is tantamount to a decision of the court that the orders and decisions of the Commission do not exceed its authority or violate any rights of the parties under federal or state Constitutions. Even though the petition be denied without opinion, the denial is nonetheless a decision on the merits and, therefore, a final judicial determination which affirms the decisions and proceedings of the Commission. *People v. Western Airlines, Inc.*, 42 Cal.2d 621, 630-631 (1954); *Southern Pac. Co. v. Van Hoosear*, 72 F.2d 903; *Consolidated Freightways, Inc. v. Railroad Com.*, 36 F. Supp. 269, 270 (1951).

B. The Issue Of The Right Of Entry Is Moot

The Jurisdictional Statement of Southern Pacific is distinguished by what it fails to state. It fails to apprise this Court of the fact that on May 21, 1980, the City (as an added precaution and in recognition of the tenacity of Southern Pacific) obtained an Order of Immediate Possession of an easement over and across the subject property from the Superior Court of the State of California in and for the County of Monterey, Action No. 76108;[2] and that on June 10, 1981, the City and Southern Pacific entered into a Stipulation for Judgment and Order thereon in said action for a final judgment of condemnation of an easement over and across the subject property, to be utilized in effecting the

[2]See Appendix "A" attached hereto.

construction of the Davis Road Grade Separation project.[3] A final Judgment of Condemnation was entered in the action on June 17, 1981.[4]

The issues raised by Southern Pacific with respect to the right of entry ordered by the Commission are moot, and the injury alleged is without substance. Assuming, arguendo, that Southern Pacific's rights to due process were somehow violated by the Commission, they were redressed in the Superior Court action. In that action, Southern Pacific was afforded an opportunity for hearing but declined it, preferring to accept a stipulated judgment and $100.00 as a substitute.

C. The Denial Of Southern Pacific's Petition For Writ Of Review By The California Supreme Court Does Not Raise Any Federal Question

Reduced to their basic element, Southern Pacific's contentions center upon the refusal of the California Supreme Court to hear its appeal below. Southern Pacific contends that this refusal impinged upon its due process rights secured by Section One of the Fourteenth Amendment of the United States Constitution. This same theory was advanced in its previous appeal to this Court. That such a contention raises only a frivolous federal question and should accordingly be dismissed is as patently discernible in this appeal as in the previous one.

In its prior appeal, Southern Pacific conceded that the California Supreme Court need not grant review in every

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[3]See Appendix "B" attached hereto.

[4]See Appendix "C" attached hereto.

case emanating from the orders of the Commission. (See Southern Pacific's Jurisdictional Statement Pages 28-29, filed in its previous appeal.) However, in this appeal, as before, Southern Pacific argues that the state court must grant review because the action of the Commission "so clearly constitutes a denial of both substantive and procedural due process";[5] and that its failure to do so "was necessarily an arbitrary action" and "denial of federal due process".[6]

It is obvious that Southern Pacific disagrees with the California Supreme Court as to the merit of the petition presented below. However, once again Southern Pacific fails to digest the clear meaning of the message of the minute order set forth in Appendices A and B of its Jurisdictional Statement, viz., that its petition failed to set forth sufficient grounds for the granting of review. Implicit in that message is the finding that the Commission's challenged orders were in compliance with apposite state statutes and regulatory law. *Western Airlines,* supra; *Consumers Lobby,* supra. Having been frustrated below, Southern Pacific again appears before this Court. Its cause is no more just and its arguments are no more compelling than they were below and in its previous appeal. The mere fact that Southern Pacific has a view of its cause that is not shared by the California Supreme Court hardly attests to a deprivation of constitutional rights or the caprice of the California Supreme Court, whose decision adversely affected it. See *Napa Valley Electric Co. v. Railroad Commission,* 6 Cal.2d 737 (1936).

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[5]Jur. St. 26-27.

[6]Jur. St. 27.

D. The Issue Of The Adequacy Of Review Of Decisions Of The Commission Under Statutory Law As Interpreted By The California Supreme Court Was Determined In The Prior Appeal

At pages 4 and 5 of its Jurisdictional Statement, footnote 7, Southern Pacific concedes that the question of the adequacy of review of Commission decisions under California law is "once again a question being raised." Southern Pacific then continues by declaring that "in this instance" the "arbitrary nature and the general unavailability of review of decisions of the California Public Utilities Commission is much more clearly demonstrated to be a substantial Federal question than it was in the previous appeal". The only reason advanced by Southern Pacific for this proposition is that the instant appeal challenges the denial of review of a Commission order allowing the City a right of entry on its property, whereas the former appeal challenged the denial of review of a Commission order which only apportioned costs of the project. It is difficult to understand this proposition in the mold cast by Southern Pacific, for it fails to demonstrate how the arbitrariness and general unavailability of review is accentuated by the nature of the order as to which review is refused. Certainly, an impingement of constitutional rights is not heightened or lessened because the order involved is one that is purported to unlawfully take money as opposed to real property.

In any event Southern Pacific, as noted, raised the issue of the adequacy of review under California law in its previous appeal. This Court dismissed that appeal for want of a substantial Federal question. That decision is a

decision on the merits as to this issue and has the conclusive effect of res judicata in this proceeding. See *Sunshine A. Coal Co. v. Adkins*, 310 U.S. 381, 60 S. Ct. 907, 84 L.Ed. 1263; *Napa Valley Electric Co. v. R. R. Comm.* (1920) 251 U.S. 366, 371-373, 64 L.Ed. 310, 313, 40 S. Ct. 174; *Southern Calif. Edison Co. v. Railroad Commission*, 6 Cal.2d 737, 50 P.2d 808; *Western Airlines*, supra, at pages 629-630; *Consumers Lobby*, supra, at pages 899-901.

Fundamentally, Southern Pacific's interpretation of the impact of the *Consumers Lobby* case represents a misunderstanding of the holding. This decision did not alter the nature of the review process as interpreted and applied by the California Supreme Court. In its opinion, the California Supreme Court noted (p. 899) that it was addressing a contention that is often presented on petitions for writ of review but nevertheless "misapplies the authority on which it relies and ignores the realities" of its "rulings on such petitions." The Court then went on to note that in reliance on the fact that the *Western Airlines* case declared that a denial of a petition for review is a decision on the merits as to the law and facts presented in the review proceedings, even though the order is without opinion, litigants often assert the applicability of the doctrine of stare decisis. The Court then noted (at p. 900) that "this reliance is misplaced. *Western Airlines* is not a stare decisis case but a res judicata case."

Southern Pacific asserts that it has difficulty understanding why a decision cannot be cited under the doctrine of stare decisis if a denial of a writ of review without opinion is, in fact, a decision on the merits both as to the law and

the facts presented.[7] Clarity may be gained by a careful reading of the Court's opinion. The doctrine of stare decisis applies only to judicial precedents, i.e., the ratio decidendi or actual ground of decision of a case cited as authority; and a case is not authority for a point not actually decided (p. 902). In short, continued the Court (p. 905),

> "although a summary denial by this Court of a petition for writ of review is a decision on the merits' for res judicata purposes (Western Airlines), it is not stare decisis. As we have seen, the merits of the decision may well be procedural rather than substantive; *yet because there is no opinion,* its ratio decidendi does not appear on its face. It would therefore be *sheer speculation* for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary: members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case *allegedly* raising the same question." (Emphasis added.)

Consumers Lobby is consistent with applicable principles of judicial review, and with common sense as well.

E. The Right To Enter Southern Pacific's Property For Construction Purposes Is Inherent In The Above Order Authorizing Construction

At the core of Southern Pacific's discontent in this appeal lies the fact that the Commission issued Decision No. 91891 which clarifies the meaning of its original order in Decision No. 91469. The Commission declared that the right to enter

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[7]Jur. St. 27.

Southern Pacific's right of way for purposes of constructing the Davis Road Overhead was inherent in the original order issued authorizing construction of the project.[8] This clarification was done at the City's behest and was necessitated by the fact that Southern Pacific raised objection with the California Department of Transportation over funding of the project on the ground that the City did not have authority to enter its right of way for construction purposes since Southern Pacific had not and would not grant a right of entry, and the Commission's Decision No. 91469 did not authorize entry.

1. Southern Pacific's Contentions Regarding The Inapplicability Of Section 1204 Are Incorrect

Section 1204 of the Code[9] must be read in light of the evident legislative intent set forth in Chapter 6, Part 1, Division 1 of the Public Utilities Code (Sections 1201 to 1220). To begin with, the Constitution of the State of California provides in Article 12, Section 5, that:

> "The legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article to confer additional authority and jurisdiction upon the commission to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain."

Pursuant to the plenary power granted the Legislature by the authority of this provision and its predecessor, the Legislature has enacted Sections 1201 et seq. of the Public

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[8] Jur. St. Appx. D-2.

[9] Hereinafter, all references to "Code" are to the California Public Utilities Code unless otherwise provided.

Utilities Code and conferred upon the Commission the authority, powers, duties and obligations therein set forth regarding the regulation of railroad crossings.

Pursuant to Section 1201 no pertinent construction at a railroad crossing may take place without the permission of the Commission first had and obtained. The Commission may refuse its permission or grant it upon such terms and conditions as it prescribes. Section 1202 provides that the Commission has the *exclusive power* to determine and prescribe the manner, including the *particular point of crossing,* and the *terms* of *installation,* operation, maintenance, use, and protection of each crossing of a railroad by a street; to alter, relocate or abolish any crossing; and to *require* a separation of grades, *prescribe the terms* upon which a separation of grades shall be made, and apportion expenses between the affected railroad and public agency.

Section 1204 provides, in full:

> "If the legislative body of the political subdivision determines that special benefits will accrue from the separation of grades to one or more districts within the political subdivision, and has made a finding to that effect and that the cost thereof, other than the portion to be paid by the railroad, interurban railroad, or street railroad involved, should be paid by such district or partly by the district and partly by the political subdivision, the commission may provide that such proportion of the total cost of the separation of grades, including the acquisition of property and the damage to property or an interest therein, as is not payable by the owners of the railroad, interurban railroad, or street railroad involved, may be assessed upon the district or that a part thereof may be paid

> by the district and a part by the political subdivision in accordance with the finding of the legislative body of the latter. The commission may provide that the physical work of making the grade separation as well as the proceedings for letting contracts therefor, collecting and enforcing the assessments, and making payment for damages and for the acquisition of property shall be done through the agency of the political subdivision in accordance with law. The order of the commission shall authorize the officers of the political subdivision to enter upon so much of the right of way of the railroad, interurban railroad, or street railroad as is necessary to effect the physical grade separation."

Sections 1206 to 1218, inclusive, are the so-called condemnation sections and set forth the procedures and authority of the Commission with regard to fixing just compensation and issuing final condemnation orders. Section 1207 provides in its introductory paragraph, in part:

> "Proceedings under Section 1206 may be commenced by order on the Commission's own motion or by a petition filed by the State . . . City . . . or . . . railroad corporation affected. Any such proceeding *may* be made a part of any proceeding commenced under Sections 1202-1205, inclusive. . . ." (Emphasis added.)

The statutory scheme, as indicated in this introductory paragraph, contemplates that proceedings under Section 1206 et seq. relating to fixing compensation and issuing final condemnation orders, may but need not be made a part of proceedings under Section 1202-1205, inclusive, relating to authorizing construction, approving the location

of the project and determining the terms pertinent thereto. These latter sections, of course, include the last sentence of Section 1204 authorizing and requiring the Commission to grant the City a right of entry.

Sections 1219 and 1220, respectively, declare Sections 1201-1205, inclusive, and Sections 1206-1218, inclusive, to be germane and cognate parts of and aids to the jurisdiction vested in the Commission for the supervision, regulation, and control of railroads. It is interesting to note that it is only in Section 1202, generally, and in Section 1204, specifically, that any reference is made to a right of entry: This subject is not referenced generally or specifically or, for that matter, even remotely, in Sections 1206-1218, inclusive.

It is against the light gleaned from this statutory background that the legislative intent in the last sentence of Section 1204 must be read. In this light, it is evident that Southern Pacific's contention that Section 1204 is inapplicable in the present case because of the "condition" limitation found in the first sentence of that section, is clearly and patently erroneous. Section 1204, in reality, deals with three subjects: 1) Assessments against districts for special benefits; 2) Provisions for doing of work; and 3) Authority of officers to enter right-of-way. Southern Pacific argues that Section 1204 is limited in its application by the *condition* that the political subdivision must first make a finding regarding assessment of costs against a benefited district and request confirmation thereof by the Commission. This condition, however, is of limited application itself, and only applies to the first subject dealt with by

Section 1204. It does not apply to the third subject to which Section 1204 speaks.

The broad powers conferred upon the Commission by the Legislature in Sections 1201 and 1202 can be exercised by the Commission without being limited by the necessity of a political subdivision first making a finding of special benefits, as contemplated in the context of the first sentence of Section 1204. To conclude, simultaneously, that the Commission is without authority to permit entry onto a railroad's right of way unless and until a political subdivision first makes a finding of special benefits to one or more districts within the political subdivision, for the unrelated purpose of assessing costs of the project, is absurd. The manifest purpose of the last sentence of Section 1204 is to enable the Commission to provide a means for implementing and effectuating projects it approves. Extension of the "condition" limitation in the first sentence of Section 1204, to delimit the authority of the Commission in the last sentence thereof, substantially impairs the jurisdiction, authority and ability of the Commission to provide for implementation of projects it approves. To accept Southern Pacific's view of things would be to implicitly accept the proposition that every order to construct issued by the Commission pursuant to Section 1202 would, at one and the same time, tell an applicant that it can construct its grade separation project on, over and/or across the right of way of the affected railroad, but that it can not enter the railroad's right of way to construct the project. This would constitute the epitome of the "good news-bad news" paradox.

Where language is fairly susceptible of two constructions, one of which will render it reasonable, fair and harmonious with its manifest purpose, and the other of which will be productive of absurd consequences, the first will be adopted. *County of Orange v. Heim* (1973) 106 Cal.Rptr. 825, 841, 30 C.A.3d 694; *Anaheim Union Water Co. v. Franchise Tax Board* (1972) 102 Cal.Rptr. 692, 698, 26 C.A.3d 95; *Lampley v. Alvares* (1975) 123 Cal.Rptr. 181, 184, 50 C.A.3d 124.

There is a strong presumption of the validity of decisions of the Commission, and its interpretation of the Public Utilities Code will not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language. *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 67 Cal.Rptr. 97, 68 C.2d 406. The Commission made an appropriate decision in issuing Decision No. 91891 and its reliance on Section 1204 was not erroneous, but proper.

2. Southern Pacific's Analogy to Section 1202.1 Is Incomprehensible

Southern Pacific contends that support for its belief that Section 1204 is inapplicable can be gleaned from the provisions of Section 1202.1. This is incomprehensible in view of the fact that Southern Pacific concedes that Section 1202.1 is inapplicable. It is vacuous and circuitous for one to argue the inapplicability of one section by analogy to another section which is admittedly inapplicable.

Section 1202.1 deals with a temporary order of the Commission designed to meet the immediate exigencies of an applicant whose needs and resources require and allow it to

proceed with project construction forthwith. It attempts to deal with the situation of the applicant who is confronted by a recalcitrant railroad that refuses to permit entry onto its right of way for construction purposes. This whole section relates to an emergency situation in which time is of the essence. The Legislature provided an efficient, expeditious and alternative means of handling the situation by providing that an applicant *may* proceed to Superior Court to obtain an order of immediate possession if it has already instituted a condemnation action in court (or upon the filing of such an action). Obviously, since the permissive "may" is used it defies logic for Southern Pacific to assert that Section 1202.1 "requires" an applicant to obtain an order of immediate possession in a "condemnation" action if it is to gain entry onto the railroad's right of way in the contemplated situation.

As the Commission declared in Decision No. 92299 (which amended Decision No. 91891), Conclusion of Law No. 2, Section 1202.1 is not applicable to a situation in which the Commission has issued a final order authorizing construction.[10]

It is noteworthy that once one traverses the maze of rhetoric and redundancy in which Southern Pacific casts its arguments, it is apparent that it has not advanced any contention that the Commission does not have the power to issue a right of entry. Rather, Southern Pacific, by analogy to Section 1202.1, maintains that the Commission could not grant the City a right of entry without a condemnation action having been instituted, since such an ac-

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[10]Jur. St. Appx. E-2.

tion is a predicate to issuance of an order of immediate possession in Superior Court.

While the institution of an eminent domain action is a required prerequisite to issuance of an order of immediate possession in Superior Court, this has nothing to do with the authority of the Commission to issue a right of entry. Eminent domain actions in Superior Court are governed by the provisions of Part 3, Title 7 of the California Code of Civil Procedure (Sections 1230 et seq.). However, as provided in Section 1230.060 of the Code of Civil Procedure.

> "Nothing in this title affects any other statute granting jurisdiction over *any* issue in eminent domain proceedings to the Public Utilities Commission." (Emphasis added.)

Southern Pacific ignores the fact that the Commission is not governed by the Code of Civil Procedure in condemnation actions. It is governed by the provisions of the Public Utilities Code.

Southern Pacific ignores the fact that the provisions of Sections 1201-1205, inclusive, relate to proceedings that need not be combined with and are not dependent on the so-called "condemnation" provisions of the Code set forth in Sections 1206-1218, inclusive.

Southern Pacific ignores the fact that Section 1202.1 is a "stop-gap" measure designed to provide alternative means of temporary relief in an urgent situation. In this regard, if a railroad refuses to allow an applicant entry upon its right of way for construction purposes, the applicant has alternative courses of action that may be fol-

lowed. The applicant may request the Commission to force the railroad under threat of contempt proceedings, to allow entry. (See Section 2113). However, since the Commission meets once every two weeks, and since the Commission is not, strictly speaking, a court with court machinery, but must itself prevail upon the courts for enforcement of its orders if all else fails (Section 2102; *Motor Transit Co. v. Railroad Commission of California* (1922) 209 P. 586, 590, 189 C. 573), this alternative might not prove expeditious or efficacious, since the whole process could take many weeks to complete. Section 1202.1 provides an opportunity for an expedient alternative.

Southern Pacific ignores the presence of Section 1217 which provides, in full:

> "The procedure provided in this chapter shall be *alternative and cumulative and not exclusive to the right* to pursue any other procedure providing for the acquisition under eminent domain proceedings of property or interest in or to property." (Emphasis added.)

3. The Right To Enter Issued By The Commission Is Not A Final Order in Condemnation

Southern Pacific argues that the giving of the right of entry by the Commission constituted the "taking" or condemnation of its property[11] and this cannot be done without notice, hearing, and compensation.[12]

Southern Pacific engages in a display of rhetoric that does no more than confound the issues before the Court.

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[11]Jur. St. 23.

[12]Jur. St. 24.

The cases cited by Southern Pacific at pages 22-23 of its Jurisdictional Statement do not lend support or credence to its contentions. None of these cases involved a right of entry situation. None of them stand for or support the proposition that the issuance of the right to enter by the Commission constituted a final order in condemnation. The cases are simply inapposite to the issues in this case.

Southern Pacific overlooks the simple fact that the Commission declared only that the City had the right to enter its property for construction purposes; and ignores the Commission's admonition in Decision No. 92299 that the authorization to enter is not intended to convey any property right to the City, and does not eliminate the need to obtain any necessary easements or other property rights through appropriate condemnation proceedings; and ignores the fact that the Commission declared that Southern Pacific could file a petition with it for any damages sustained by the City's entry upon its right of way.[13]

Obviously, the Commission did not issue a final order in condemnation for which Sections 1206 et seq. would require the type of notice, opportunity to be heard, and just compensation envisioned therein. The procedure for final condemnation of property set forth in Section 1206 et seq. and recognized by the Commission in Decision No. 91891, as amended by Decision No. 92299, fully comport with applicable principles of constitutional law. Southern Pacific was not denied due process. The established procedures and the Commission's actions guarantee Southern Pacific due notice, an opportunity for a fair hearing, and just com-

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[13]Jur. St. Appx. E-2 and 3.

pensation prior to any final order in condemnation "taking" its property. Due process does not require anything more. As already noted, Southern Pacific's rights were also fully protected in the proceeding in Superior Court by which the City condemned the subject property pursuant to a stipulated judgment.

For all of the foregoing reasons generally, and based on the provisions of the last sentence of Section 1204 specifically, the order authorizing the City's entry on Southern Pacific's right of way was inherent in Decision No. 91469 by operation of law.

F. The Contention That The Commission Did Not Regularly Pursue Its Authority In Issuing Decision No. 91891 Is Incorrect

At pages 25 and 26 of its Jurisdictional Statement Southern Pacific asserts that the Commission in issuing Decision No. 91891 violated Sections 1736 and 1708 of the Public Utilities Code, in that it modified Decision No. 91469 without a rehearing having been held and Southern Pacific having been afforded an opportunity to be heard on the matter.

Perhaps the most glaring oversight in Southern Pacific's analysis of the Commission's action in issuing Decision No. 91891 is the fact that the decision itself adds nothing to the original decision that wasn't there in the first instance.

In Decision No. 91891, the Commission stated:

> ". . . Decision No. 91469 . . . authorized construction of the Davis Road Overhead. *Inherent* in this authorization . . . is authorization to the City to enter onto

so much of SP's right-of-way as it must to carry out the construction. . . ." (Emphasis added).[14]

The Commission also stated that the authorization to enter is:

". . . not only a necessary and logical concomitant of an order authorizing construction, but is supported by legislative enactment as well.[15]

The Commission concluded that:

"Despite our view that this authorization pursuant to Section 1204 is *inherent* in Decision No. 91469, to *avoid any confusion on this point,* we will modify that decision to *explicitly* recognize the operation of that statute." (Emphasis added).[16]

Decision No. 91891 does not substantively modify Decision No. 91469 by adding something to it or subtracting something from it. It does not enlarge or diminish any rights or obligations existing in Decision No. 91469. It merely expresses that which is implicit in Decision No. 91469. The modification effected, therefore, is one of form, not substance. As such, it is a modification that may be made pursuant to Rule 43 of the Commission's Rules of Practice and Procedure (set forth in Title 20 of the California Administrative Code).

Rule 43 provides, in part, that

"Petitions for modification . . . shall only be filed to make *minor changes* in a Commission decision or order.

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[14]Jur. St. Appx. D-2.

[15]Jur. St. Appx. D-2.

[16]Jur. St. Appx. D-3.

> *Other desired changes shall be by application for rehearing* or by a new application." (Emphasis added)

The established procedure clearly allows for minor changes to be made in a decision without first conducting a rehearing or a new original hearing, as would be required by Sections 1736 and 1708 in the case of changes that are not minor in nature. In the present case, the modification made is of language only, not substance. The change, at most, is a minor one, and a rehearing or a new original hearing is not required as a condition precedent thereto. It is interesting to note that Southern Pacific avoids any reference to Rule 43 in its petition.

In addition, Rule 87 of the Commission's Rules of Practice and Procedure supports this position by providing:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. Rules may be amended anytime by the Commission."

Further support for this position is found in Section 1701 of the Public Utilities Code which provides:

> "All hearings, investigations, and proceedings, shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

Southern Pacific fails to make any attempt to differentiate between a minor modification permitted to be made in accordance with the procedure prescribed in Rule 43 and "other" modifications predicated upon the provisions of Sections 1736 and 1708. It is obvious why it has not done so.

IV

CONCLUSION

Southern Pacific fails to raise any issue not adequately decided below on state grounds or presenting a substantial federal question. Wherefore, the City respectfully submits that the instant appeal should be dismissed or, alternatively, the judgment below should be affirmed.

Dated: July 10, 1981
Salinas, California

Respectfully submitted,

DAVID M. KENNEDY
COUNSEL OF RECORD
City Attorney, City of Salinas

RAYMOND M. HAIGHT
SPECIAL COUNSEL
Attorneys for Real Party In Interest

(Appendices follow)

Appendix A

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David M. Kennedy, Assistant
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Salinas, CA 93901
Telephone: (408) 758-7256
Attorneys for Plaintiff

In the Superior Court of the State of California
In and For the County of Monterey

No. 76108

City of Salinas, a municipal corporation,
Plaintiff,

vs.

Southern Pacific Transportation Co., a Delaware Corporation, County of Monterey, Doe 1 to Doe 10, inclusive,
Defendants.

[Filed May 21, 1980]

ORDER FOR PREJUDGMENT POSSESSION

Based upon the declarations and other documents filed by plaintiff in support of its application for prejudgment possession, including the complaint on file in this case,

IT IS HEREBY ORDERED and DETERMINED that:

1. Plaintiff has made a deposit of the probable just compensation and filed a summary of the basis for apprais-

al opinion, both of which meet the requirement of Code of Civil Procedure, Section 1255.010, for the parcel set forth in the complaint.

2. The parcel to be acquired is described by reference to plaintiff's complaint on file herein. Plaintiff is entitled to possession of said parcel.

3. The time for service of this order may be not less than thirty (30) days prior to the time plaintiff is to take possession of said parcel.

4. The effective date of this order as to said parcel shall be January 2, 1981, or within thirty (30) days after service of the order for possession is made on the defendant-owners thereof.

5. On or after the date specified herein of service of this order, plaintiff is authorized to enter upon and take immediate possession of said parcel of land being condemned herein.

Dated: May 21, 1980.

NAT A. AGLIANO

Judge of Said Superior Court

Appendix B

David Kennedy, City Attorney
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Burlingame, CA 94010
Tel: (415) 348-7130
Attorneys for Plaintiff

In the Superior Court of the State of California
In and For the County of Monterey

No. 76108

City of Salinas, a municipal corporation,
Plaintiff,

vs.

Southern Pacific Transportation Company,
a Delaware corporation, et al.,
Defendants.

[Filed June 17, 1981]

STIPULATION FOR JUDGMENT AND ORDER THEREOF

IT IS STIPULATED between Plaintiff City of Salinas, a Municipal corporation, and Defendant Southern Pacific Transportation Company, a Delaware corporation, through their respective attorneys, as follows:

1. The complaint in this action was filed on May 21, 1980 to condemn the easement title to the property described in said complaint.

2. Defendant Southern Pacific Transportation Company represent that at the time of and immediately preceding the filing of the complaint, it was and now is the owner of the subject property.

3. Said Defendant has been served with summons and complaint in this action, and it is fully informed as to all matters affecting said property and expressly waives any and all other process of notice and any rights affected thereby.

4. On April 21, 1981, Chase Manhattan Bank filed a Disclaimer with the court, disclaiming any interest in and to the property being condemned herein.

5. The subject property is more particularly described in Exhibit "A" attached hereto and incorporated by reference herein.

6. That the court is authorized and petitioned to enter without further notice a judgment decreeing the easement title in and to the land, improvements, and fixtures on the subject property more particularly described in Exhibit "A," is taken and condemned as authorized by law and adjudging that the sum of One Hundred Dollars ($100.00), inclusive of interest, is full, adequate and just compensation for the taking thereof.

7. That Plaintiff City of Salinas will forthwith deposit, for said Defendants' behalf, the agreed upon just compensation, in the amount of One Hundred Dollars ($100.00), into escrow at Western Title Insurance Com-

pany, Salinas, California, together with appropriate escrow instruction, and the fee simple title in and to the subject property will forthwith vest in Plaintiff free and discharged of all claims and liens of every kind whatsoever upon recordation of the Final Judgment herein.

8. That the real property taxes, including any delinquencies, costs and interest, if any, shall be prorated (in accordance with Revenue and Taxation Code Section 4986) as of the date of the recordation of the Final Judgment, and such portion of said taxes as is attributable to the period from and after said date be, and the same are hereby cancelled, and that the lien for real property taxes, insofar as they affect the subject parcel, be cancelled, and the Auditor of the County of Monterey is directed to take whatever steps are necessary to cancel said taxes, and the lien for real property taxes, insofar as the lien for real property taxes affect the subject property, is to be cancelled and extinguished.

9. That the special assessment liens, insofar as they affect the subject property, including all delinquencies, costs, interest and principal, shall be paid off and the bonds retired and cancelled. The Auditor and/or Treasurer of the County of Monterey is directed to take whatever steps are necessary to retire and cancel said assessment bonds and to extinguish the assesssment liens.

10. Each of the parties hereto are to pay their own respective litigation costs and attorneys' fees.

Dated:

DAVID KENNEDY,
CITY ATTORNEY
LYNCH & NAVE

/s/ Michael R. Nave

Michael R. Nave
Attorneys for Plaintiff

HOGE, FENTON, JONES
& APPEL, INC.

Dated: June 10, 1981

/s/ Lewis L. Fenton

Lewis L. Fenton
Attorneys for Defendant
SOUTHERN PACIFIC
TRANSPORTATION
COMPANY

ORDER ON STIPULATION AND JUDGMENT

IT IS ORDERED this 17th day of June, 1981.

RALPH M. DRUMMOND

Judge of the Superior Court

EXHIBIT A

DESCRIPTION OF EASEMENT TO BE ACQUIRED

A perpetual easement for construction and maintenance of an overcrossing for vehicular traffic over and across the real property situate in the City of Salinas, Monterey County, California described as follows:

Being a portion of that certain parcel of land conveyed to the Southern Pacific Transportation Company being more particularly described as follows; to wit:

Beginning at a point in the southerly boundary of that above-described parcel of land, said point being the northwest corner of that certain parcel of land conveyed to the Pacific Gas and Electric Company, a California Corporation by deed recorded July 23, 1956 in volume 1723 at page 395 therein Official Records of Monterey County, California thence along said southerly boundary

(1) N.64°46′00″W. 290.00 feet to a point; thence departing from said southerly boundary

(2) N.25°14′00″E. 18.00 feet to a point; thence

(3) S.64°46′00″E. 80.00 feet to a point; thence

(4) N.29°02′31″E. 132.37 feet to a point in the northerly boundary of said parcel of land; thence along said northerly boundary

(5) S.64°46′00″E. 120.68 feet to a point; thence departing from said northerly boundary

(6) S.25°00′14″W. 132.08 feet to a point; thence

(7) S.64°46'00"E. 80.00 feet to a point; thence

(8) S.25°14'00"W. 18.00 feet to the place of beginning. Containing 0.500 acre of land more or less. (21774.67 s.f.)

[Seal]

Appendix C

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Tel: (415) 348-7130
Attorney for Plaintiff

In the Superior Court of the State of California
In and For the County of Monterey

No. 76108

City of Salinas, a municipal corporation,
Plaintiff,

vs.

Southern Pacific Transportation Company,
a Delaware corporation, et al.,
Defendants.

[Filed June 17, 1981]

FINAL JUDGMENT OF CONDEMNATION

It appearing to the court that Plaintiff, in accordance with the Stipulation for Judgment between the parties, is to forthwith deposit for the Defendant's benefit the sum of One Hundred Dollars ($100.00).

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the easement title in and to the land.

improvements, and fixtures on the subject properties for park purposes will vest in Plaintiff free and discharged of all claims and liens of every kind whatsoever forthwith upon recordation of this Final Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

(a) The public interest and necessity require the project;

(b) The acquisition is planned and located in the manner that will be most compatible with the greatest public good and to the least private injury; and

(c) The property sought to be acquired is necessary for the purpose of a railroad crossing for vehicular and non-vehicular traffic and appurtenances hereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the real property taxes, including any delinquencies, costs and interest, if any, shall be prorated (in accordance with Revenue and Taxation Code Section 4986) as of the date of the recordation, of this Final Judgment, and such portion of said taxes as is attributable to the period from and after said date be, and the same is hereby cancelled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any special assessment liens shall be extinguished and the assessment bonds cancelled as of the date of the recordation of this Final Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the subject property is situate in the County of Monterey, State of California, and more particularly

described in Exhibit "A" attached hereto and by this reference made a part hereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of Plaintiff and against Defendant herein on the complaint.

DONE IN OPEN COURT this 17th day of June, 1981.

RALPH M. DRUMMOND

Judge of the Superior Court

EXHIBIT A

DESCRIPTION OF EASEMENT TO BE ACQUIRED

A perpetual easement for construction and maintenance of an overcrossing for vehicular traffic over and across the real property situate in the City of Salinas, Monterey County, California described as follows:

Being a portion of that certain parcel of land conveyed to the Southern Pacific Transportation Company being more particularly described as follows; to wit:

Beginning at a point in the southerly boundary of that above-described parcel of land, said point being the northwest corner of that certain parcel of land conveyed to the Pacific Gas and Electric Company, a California Corporation by deed recorded July 23, 1956 in volume 1723 at page 395 therein Official Records of Monterey County, California thence along said southerly boundary

(1) N.64°46'00"W. 290.00 feet to a point; thence departing from said southerly boundary

(2) N.25°14'00"E. 18.00 feet to a point; thence

(3) S.64°46'00"E. 80.00 feet to a point; thence

(4) N.29°02'31"E. 132.37 feet to a point in the northerly boundary of said parcel of land; thence along said northerly boundary

(5) S.64°46'00"E. 120.68 feet to a point; thence departing from said northerly boundary

(6) S.25°00'14"W. 132.08 feet to a point; thence

(7) S.64°46'00"E. 80.00 feet to a point; thence

(8) S.25°14'00"W. 18.00 feet to the place of beginning. Containing 0.500 acre of land more or less. (21774.67 s.f.)

[Seal]

AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2131

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

VS.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM FILED BY APPELLEE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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No. 80-2131

In the Supreme Court

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SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
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On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM FILED BY APPELLEE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Appellant, Southern Pacific Transportation Company, files this brief in opposition to the Motion to Dismiss or Affirm of the Appellee (sometimes hereinafter refrred to as "the Commission"), dated July 16, 1981.

I

THE COMMISSION HAS ATTEMPTED TO AVOID THE PRINCIPAL ISSUE BY MAKING GENERALIZED STATEMENTS AND MISREPRESENTING THE CONTENTS OF PLEADINGS FILED WITH THE COMMISSION BY APPELLANT

The Commission does not dispute the fact that the California Supreme Court, in *City of Oakland v. Schenck,* 197 Cal. 456, 460 (1925), has unequivocally held that the railroad's right of way is private property and can only be taken pursuant to a statute conferring the power of eminent domain and making provision for reasonably compensating the owner. The Commission has been given eminent domain powers, including the power to award compensation and issue final orders of condemnation in a case of this type, by Sections 1206-1208 of the California Public Utilities Code. The problem herein is that the Commission was not requested to exercise those powers by the City of Salinas, it has not exercised those powers in the manner specifically prescribed by these unambiguous sections of the Public Utilities Code and, moreover, it has issued its order retroactively taking appellant's property by amending and modifying a previous order without complying with Sections 1708 and 1736 of the California Public Utilities Code which specify when and how the Commission is permitted to amend its orders. Instead of directly addressing itself to what has actually occurred, the Commission's motion attempts to side-step the problem with generalized statements that are often irrelevant and, in at least one case, misrepresent what is contained in the pleadings of record.

A. The Fact That Interpretation and Operation of State Statutes Is the Responsibility of the Commission and the California Courts In the First Instance, Is Irrelevant

The Commission first asserts that interpretation and operation of state statutes is the exclusive responsibility of the Commission and the California courts (Cal. Motion, p. 2).[1] Appellant does not contest this assertion. However, it is irrelevant.

The fact that the Commission and the California courts may, in the first instance, have the responsibility for interpretation and operation of state statutes does not establish that the statutes, either by their own wording or as interpreted and applied by either the Commission or the California courts, meet the basic requirements of Federal due process. Nor does it establish that either the Commission or the courts have acted in accordance with such due process requirements. In this regard, it is particularly important to note that even in its Decision No. 92299 (Jurisdictional Statement, Appendix E), in which the Commission attempted to bolster its earlier decision by adding various conclusions of law, it assiduously *avoided* any discussion or reference to Sections 1206-1208, 1708 and 1731 of the California Public Utilities Code, which specify the manner in which the Commission can exercise condemnation powers and modify its orders, which were the principle statutory provisions relied upon in the application for rehearing. Thus, how the Commission can assert that it has somehow interpreted the California statutes which provide the principal basis for this appeal, is incomprehensible. What it did was *ignore* them, just as it has also done in its motion to dismiss herein, and that is the principal

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[1]References to the Motion to Affirm or Dismiss filed by the California Public Utilities Commission of the State of California herein, shall be abbreviated as "Cal. Motion", followed by a page citation.

reason why this appeal has been filed. Moreover, as pointed out in Section II herein (*infra.* p. 5), the Commission's attempt to construe the California Supreme Court's denial of review and rehearing as an interpretation of the statutes involved herein, is directly contrary to the California Supreme Court's most recent pronouncement concerning the meaning to be ascribed to a denial of review of a Commission decision.

B. The Commission Has Misrepresented the Contents of Formal Pleadings Filed with the Commission by the Appellant

At page 4 of its motion, the Commission apparently acknowledges that it entered its retroactive order, modifying a previous decision by adding a new order granting the City an interest in the real property of appellant, without an opportunity to be heard or present evidence. However, it attempts to neutralize that damaging fact by asserting that the appellant filed both a petition for rehearing and a reply to a subsequent brief by the City in which it raised issues that were "purely legal" and "never alleged that the convention of a hearing was necessary for the taking of additional factual evidence". This is a misrepresentation of what was set forth in the pleadings cited.[2]

In the reply filed on July 25, 1980, for example, the following statement appears on page 3:

> "In the Application for Rehearing filed herein on July 1, 1980, respondent pointed out that only because of the Commission's retroactive modification did Cal-

---

[2]The petition for rehearing of July 1, 1980 and appellant's reply to the subsequent brief of Salinas on July 25, 1980 are reproduced in their entirety in the appendix to the petition for writ of review filed with the California Supreme Court and, as a result, will be included in any record certified to this Court for purposes of this appeal.

> Trans reverse its position and make an allocation to the City of Salinas. Moreover, if rehearing is granted, *it has offered to produce evidence,* by way of certified pleadings and affidavits of the City, that this project most likely would never have been built in the absence of a reversal of CalTrans position which occurred solely as a result of the alleged 'minor' modification . . ." (Emphasis added)

Therefore, while the complete failure of the Commission to provide an opportunity to be heard and present evidence, as specifically required by California statute, would seem to be more than enough, in itself, to establish a denial of federal due process, the Commission's assertion that the appellant never alleged in its formal pleadings to the Commission that a hearing was necessary for the taking of additional factual evidence, is patently erroneous and is a misrepresentation of the contents of the pleadings cited.

II

THE COMMISSION HAS IGNORED THE RECENT AND EXPLICIT STATEMENTS OF THE CALIFORNIA SUPREME COURT IN THE CONSUMERS LOBBY CASE

At page 2 of its motion, the Commission asserts that the denial of review and rehearing by the California Supreme Court "fully affirms" the actions of the Commission under state law and cites *People v. Western Airlines, Inc.,* 42 Cal. 2d 621, 630-631 (1954). On page 5 of its motion it pursues this idea further by asserting that denial of review by the California Supreme Court, "inasmuch as none of the procedural defects discussed the *Consumers Lobby* opinion" are present in the instant case, is a "clear message" from the California Supreme Court that the petition for writ of review failed to set forth sufficient grounds for

the granting of review. These assertions are in direct contradiction to what the California Supreme Court actually stated in *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891 (1979).

In the *Consumers Lobby* case, the California Supreme Court substantially clarified (or changed, depending upon one's point of view) its earlier decision in *People v. Western Airlines, Inc.*, 42 Cal. 2d 621 (1954), appeal dismissed 348 U.S. 859. In the *Consumers Lobby* case the California Supreme Court has made it abundantly clear that the assertions of the Commission in its motion concerning the meaning or effect to be given to the California Supreme Court's denial of review are unjustified. As the California Supreme Court stated in the *Consumers Lobby* case (p. 905; see also, Appendix to Jurisdictional Statement, p. I-9), a summary denial of review does not set forth any reason why the review has been denied and, according to the California Supreme Court, it would "therefore be sheer speculation for litigants to rely on such decisions as precedent." If that is the case, then it is also "sheer speculation" for the Commission to assert that denial of review of this case represents a "clear message" that the Commission's orders "were in compliance with apposite state statutes and regulatory law." (Cal. Motion, p. 5). If that were true, it must be obvious that the Commission would be entitled to treat the action of the California Supreme Court as a precedent in future cases. In other words, the California Supreme Court's denial without opinion would be treated as stare decisis, which is diametrically opposed to what the California Supreme Court actually held in the *Consumers Lobby* case.

The Commission also asserts that the California Supreme Court's decision in *Consumers Lobby* did not significantly alter the nature of the review process with respect

to decisions of the California Public Utilities Commission (Cal. Motion, p. 7). It is submitted that this assertion of the Commission simply will not stand up under scrutiny. A simple reading of the decision in the *Consumers Lobby* case will demonstrate that it is inconsistent with any contention that a denial of review represents a holding that the Commission correctly interpreted state statutes or did not exceed its statutory authority. In fact, that very contention was made by the Commission in the *Consumers Lobby* case (p. 899). However, the contention was rejected and the California Supreme Court went out of its way to warn that it would be "sheer speculation" for litigants to try to determine what the reasoning of the California court was when it has denied review (p. 905).

CONCLUSION

The motion of the Commission fails to provide any reasonable basis for dismissal of the appeal. The fact remains that the Commission, without complying in any way with specific California statutes on the subject, has retroactively entered an order, modifying a previous decision, which condemns an interest in the real property of the appellant without compensation, hearing or an opportunity to present evidence, and the California Supreme Court, without explanation, has refused to review that decision. The Commission attempts to divert attention from its blatant disregard of specific statutory requirements, as well as its disregard of procedural and substantive due process requirements, by taking the position that it must be assumed from the fact that the California Supreme Court denied review that the Commission's action was in accord with both state law and the basic due process requirements of the United States Constitution, despite the fact that the California Supreme Court did not have the record before it since it denied review and has specifically said that any such assumption would be improper since it would constitute "sheer speculation".

If the motion of the California Commission establishes anything at all, it is that perhaps this Court, instead of according plenary consideration to the matter, should act summarily by issuing an order stating that the action of the Commission herein clearly raises a substantial question as to whether the Commission's action denied appellant both substantive and procedural due process required by the Fourteenth Amendment of the Constitution of the United States, so that there is no doubt that review should have been granted by the California Supreme Court, and direct that the order of the California Supreme Court denying review be reversed as being in conflict with previous decisions of this Court which provide that availability of an adequate opportunity for review of administrative decisions is an essential requirement of due process required by the Fourteenth Amendment of the Constitution of the United States (see Jurisdictional Statement, p. 30). It is submitted that, in any event, the Motion to Dismiss or Affirm does not set forth any legal basis for granting the motion and Appellant respectfully submits that the motion should be denied.

Dated: July 31, 1981.
San Francisco, California.

Respectfully submitted,
HAROLD S. LENTZ
Attorney for Appellant

Office-Supreme Court, U.S.
FILED
AUG 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2131

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
a corporation,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee,

CITY OF SALINAS,
Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM FILED BY REAL PARTY IN INTEREST CITY OF SALINAS

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Real Party in Interest.

On Appeal From the Supreme Court of the State of California

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM FILED BY REAL PARTY IN INTEREST CITY OF SALINAS

Appellant, Southern Pacific Transportation Company, files this brief in opposition to the Motion to Dismiss or Affirm of the Real Party in Interest (sometimes hereinafter referred to as "the City"), dated July 10, 1981 (but not served by mail until July 16, 1981).

FOREWORD

In view of the page limitation imposed by Rule 16.5 of the Court's Rules, it will not be possible for appellant to provide detailed responses to all of the assertions and arguments in the motion of the City. However, some of the

City's contentions are approximately the same as presented in the Motion to Dismiss or Affirm filed by the appellee and have been responded to in appellant's Brief in Opposition to the motion of the Commission. Other contentions have already been covered in the Jurisdictional Statement and any detailed response herein would be largely repetitious. Therefore, to the extent possible, appellant will simply rely upon references to the Jurisdictional Statement and its Brief in Opposition to the motion of the Commission in responding to contentions set forth in the Motion to Dismiss or Affirm filed by the City of Salinas.

I

THE CITY'S ASSERTIONS CONCERNING THE WEIGHT TO BE GIVEN TO THE DENIAL OF REVIEW BY THE CALIFORNIA SUPREME COURT ARE ERRONEOUS

At pages 2-3, 4-5, and 6-8, the City presents contentions which seem to be substantially the same as the principal argument of the Commission in its Motion to Dismiss or Affirm. Like the Commission, the City contends (p. 5) that the "message" in the denial of review by the California Supreme Court amounts to a holding that the Commission acted "in compliance with apposite state statutes and regulatory law." The quoted wording is identical to that which appears in the Commission's motion (Cal. Motion, p. 5).[1] Such an argument is clearly untenable in view of the California Supreme Court's recent decision in *Consumers Lobby Against Monopolies v. Public Utilities Commission,*

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[1]References to the Motion to Affirm or Dismiss filed by the California Public Utilities Commission of the State of California herein, shall be abbreviated as "Cal. Motion", followed by a page citation. References to the Motion to Affirm or Dismiss filed by the City of Salinas herein, shall be abbreviated as "City Motion", followed by a page citation.

25 Cal. 3d 891 (1979), in which it went out of its way to warn that it would be "sheer speculation" for litigants to try and determine what the reasoning of the California court was when it has denied review without hearing (p. 905). This subject has been fully covered in Sections IA and II (pp. 3-4, 5-7) of the Brief of Appellant in Opposition to Motion to Dismiss or Affirm filed by the Commission and the Court is respectfully referred thereto.

II

THE ISSUE IS NOT MOOT

At pages 3-4, the City contends that the issue of the Commission's granting a right of entry is moot by reason of the fact that, *subsequent* to the issuance of the Commission's amended order, it has obtained a judgment of condemnation in the regular courts. This contention was anticipated and the reason why the issue is not moot is basically set forth in footnotes 6 and 8 of the Jurisdictional Statement (pp. 3-5), to which the Court is respectfully referred.

If the obtaining of a subsequent judgment of condemnation in the regular courts could or did make the issue moot, there was no need for the City to implore the Commission to amend its decision to include an additional order granting a right of entry, which was relief that had not previously been specifically requested as required by Rule 15 of the Commission's Rules. Also, its subsequent vigorous opposition to the railroad's petitions for rehearing by the Commission and for writ of review in the California Supreme Court, as well as its opposition to the present appeal, would be pointless. Its vigorous objections only serve to emphasize that the matter is *not* moot because, without the issuance of a retroactive order by the Commisison granting the City an interest in the railroad's real property, as apparently admitted by the City, the project could

not proceed regardless of whether or not it subsequently obtained a judgment of condemnation in the regular courts.

The simple fact is that the City failed to act in a timely manner and, as a result, failed to provide the California Department of Transportation with evidence of a right of entry prior to April 1, 1980, as required by longstanding regulations of the California Department of Transportation (21 Cal. Adm. Code, Subchapter 13, Sections 1554(b) and 1552) and, as a result, CalTrans denied the City a $5,000,000 allocation from the State's Grade Separation Fund. The City, when imploring the Commission to help it overcome its mistake by issuing a retroactive condemnation order, made it clear that without the $5,000,000 allocation the project would not proceed so that no property interest or monetary contribution would be obtained from the railroad. That is obviously why the City, in support of its request for a modification of the Commission's decision, "nuc pro tunc", to include a specific order awarding the City a right of entry upon the real property of the railroad (which the Commission did without hearing or an opportunity to present evidence), advised the Commission that it was making the request because:

> ". . . at stake is a potential $5,000,000 in funding from the California Grade Separation Fund, *plus* an additional amount of approximately $729,000 representing SP's anticipated contribution under the order." (Emphasis added).

It was only because the Commission did amend its order on a retroactive basis that the California Department of Transportation reversed its position. This was specifically acknowledged in a declaration by the attorney for the Department of Transportation, filed in the Superior Court of the State of California in the County of San Francisco, No. 76711. Moreover, in that declaration the CalTrans at-

torney further indicated that the California Department of Transportation will reverse its position in the event that the Commission's decision is reversed or annulled on review or appeal, i.e. the City will lose its $5,000,000 allocation and, according to the representation it made to the Commission in seeking a retroactive order granting it a right of entry, it would appear that the entire project would not proceed so that appellant will not have to spend approximately three quarters of a million dollars on the City's project and no easement or rights of entry would be exercised. For the information of the Court, the declaration of the Attorney for the California Department of Transportation which has been refered to, is reproduced in the attached Appendix as Appendix G.[2]

In summary, the fact that the City obtained a subsequent judgment of condemnation could not make the issue moot for the simple reason that the subsequent judgment of condemnation was not a retroactive order. Therefore, it cannot serve to satisfy the requirements of the regulations of the California Department of Transportation for purposes of obtaining an allocation from the Grade Separaton Fund. In other words, whether the project proceeds appears to be entirely dependent upon the validity of the Commission's retroactive order. Therefore, the question of the validity of that order is not moot.

III

THE CITY'S OTHER CONTENTIONS FAIL TO ESTABLISH A BASIS FOR DISMISSAL OF THE APPEAL

The remainder of the City's motion (pp. 8-22) basically contends that the Commission's orders were valid and that, if they were invalid, appellant has not been harmed. It is

[2]For purposes of identification and paging, the attached Appendix has been treated as if it were an amendment or addition to the Appendix attached to the Jurisdictional Statement.

submitted that, in general, these contentions are not responsive to the Jurisdictional Statement, are self-contradictory and are erroneous. While the inadequacy of the arguments appearing at pages 8-22 of the City's motion are generally apparent, either on their face or from a reading of the Jurisdictional Statement, some of the contentions call for additional comment.

A. The City's Contentions concerning interpretation of Section 1204 are erroneous

A major portion of the City's motion consists of an attempt to establish the validity of the Commission's interpretation of Section 1204 of the California Public Utilities Code. In this regard, it begins with a proposition with which appellant fully agrees (City Motion, page 9):

> "Section 1204 of the Code must be read in light of the evident legislative intent set forth in Chapter 6, Part 1, Division 1 of the Public Utilities Code (Sections 1201 to 1220)."

The problem with the City's argument is that the City has failed to do precisely what is says "must" be done, i.e. read Section 1204 in the light of other statutes in the chapter of which it is a part. The most important failure in this regard is the City's failure to recognize that Section 1202.1 is one of those statutes which must be read in conjunction with Section 1204 in order to ascertain its meaning.

In general, appellant believes that most of the arguments of the City concerning interpretation of Section 1204 are adequately covered in the Jurisdictional Statement, to which the Court is respectfully referred. However, at least one erroneous assertion of the City should be pointed out. At page 12, the City asserts that it is "only in Section 1202, generally, and in Section 1204, specifically, that any reference is made to a right of entry". That assertion is incorrect. There is no reference to a right of entry, either gen-

erally or specifically, in Section 1202. While Section 1204 does provide that the Commission can authorize officers of a political subdivision "to enter upon" a right of way, it is in Section 1202.1, which the Commission and the City both desperately seek to ignore, that a "right of entry to permit the applicant to proceed with the work to be performed", is specifically mentioned.

B. Section 1202.1 establishes the clear intent of the Legislature that a "right of entry" is a property right which can only be taken in a condemnation action

At pages 14-17, the City professes not to comprehend the reasons for appellant's references to Section 1202.1. The first basis it offers for its lack of comprehension is the fact that Section 1202.1 was not brought into play and is not specifically applicable in this proceeding. However, all that appellant has done is follow the same principle that the City advocates on page 9 of its motion, to wit:

> "Section 1204 of the Code *must* be read in light of legislative intent set forth in Chapter 6, Part 1, Division 1 of the Public Utilities Code (Sections 1201-1220)" (Emphasis added).

This includes Section 1201.1, which becomes particularly important when it is remembered that Section 1201.1 is a much more recent statute than Section 1204, it specifically uses the phrase "right of entry to permit the applicant to proceed with the work to be performed" and it provides that such a "right of entry" can only be obtained in a "condemnation action". Since, as the City itself contends, Section 1204 must be read in the light of other statutes in Chapter 6, it would appear that there is no basis for contending that the authorization "to enter upon" railroad property referred to in Section 1204 is intended to be something different from the "right of entry" referred to Section 1202.1. Thus, Section 1201.1 establishes, as a mat-

ter of clear legislative intent, that a right of entry is a property right which can only be taken in a condemnation action.

At page 15 of its motion, the City attempts to discount appellant's argument on the ground that appellant has not "advanced any contention that the Commission does not have the power to issue a right of entry." It is correct that appellant does not contend that the Commission does not have condemnation powers. It does. However, that supports rather than detracts from appellant's position. The problem in this instance is not that the Commission lacks the power it has asserted. The problem is simply that it has exercised that power improperly and in a manner that is not consistent with either statutory or constitutional due process requirements. A right of entry has clearly been established by the legislature as being a property right which can only be granted in a condemnation action. While the Commission has been given condemnation powers, the City never requested it to exercise those powers nor did the Commission institute a condemnation action on its own motion and make it a part of the proceeding as specifically required by Section 1207 of the Public Utilities Code.

C. The Contention That The Railroad's Right To Damages Has Been Protected, Is Erroneous

At pages 17-19, the City attempts to contend that appellant has not been harmed in any event because the Commission has "declared" that appellant can file a petition for damages. The problem with this line of argument is that the damage to appellant has been caused by the Commission by issuance of a retroactive order which contravenes statutory and due process requirements. In other words, it is the Commission which should obviously be the party from whom damages would have to be sought. However, the Commission, as a state agency, is immune from suit.

California Government Code, §§ 815.2, 820.2 and 820.6. Thus, the appellant cannot be made whole by any alleged right to seek damages. The harm to appellant is irreparable in the absence of a decision by this Court on appeal.

D. Sections 1736 and 1708, Governing The Manner In Which The Commission May Amend Or Modify Decisions, Makes No Exception For Alleged "Minor" Modifications

At pages 19-22, the City deals with the failure of the Commission to comply with the requirements of Sections 1708 and 1736, which prescribe when and how the Commission may amend or modify its orders. The most interesting aspect of the City's argument is that it does *not* contend that the Commission complied with either section. Instead, it purports to offer excuses for the Commission's failure to comply with those procedural requirements.

Its first alleged excuse is that Decision No. 91891 did not add anything to the original decision. That simply is not true. A specific ordering paragraph was added:

> "Pursuant to Public Utilities Code Section 1204, the City of Salinas is authorized to enter upon so much of the right of way of SP as is necessary to effect the physical grade separation."

It was on the basis of this retroactive order that the California Department of Transportation reversed its previous denial of a $5,000,000 allocation, without which the project could not proceed and the entire proceeding would indeed have been moot. Under such circumstances, it is submitted that it is completely unreasonable to assert that nothing of substance was added to the original decision.

At pages 20-22, the City contends that appellant's arguments should be disregarded because appellant makes no attempt "to differentiate between a minor modification" and other modifications (City's Motion, p. 22). The trouble

with this contention is that Sections 1708 and 1736 themselves do not make such a differentiation. They apply to *all* amendments and modifications. Nor can it reasonably be contended that the Commission's Rules of Practice and Procedure somehow control or change an interpretation of the statutory provisions. If the Commission's Rules of Practice and Procedure were so overwhelmingly important, the Commission should never have issued its alleged modification at all since the City never complied with Rule 15 (20 Cal. Adm. Code 15), which requires that "all applications shall state clearly and concisely the authorization or relief sought; . . . ." and the City did not, as part of its application, request an order granting a right of entry. However, it is submitted that it is not the Commission's rules that control when and how an amendment or modification may be made. That has been provided for by statute. Specifically, Sections 1708 and 1736 of the Public Utilities Code. Those sections do not provide any exception for a so-called "minor" modification and the City has not even contended that those sections were complied with. It has simply contended that they *do not need* to be complied with. It is submitted that such a contention is patently erroneous.

CONCLUSION

It is submitted that the City has failed to provide any reasonable basis for a dismissal of the appeal. Therefore, applicant respectfully submits that the Motion to Dismiss or Affirm should be denied.

Dated: August 4, 1981
San Francisco, California.

Respectfully submitted,
HAROLD S. LENTZ,
Attorney for Appellant

(Appendix follows)

Appendix G

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Superior Court of the State of California
In and For the City and County of San Francisco

No. 767711

Southern Pacific Transportation Company,
Plaintiff,
v.
California Transportation Commission, Department of Transportation of the State of California and Adriana Gianturco, Director of Department of Transportation,
Defendants.

Declaration of Eugene C. Bonnstetter in opposition to complaint for injunction.

I, Eugene C. Bonnstetter, do hereby declare and say as follows:

1. I am an attorney, licensed to practice law in the State of California, and have been practicing law since 1971.

2. I have been employed by the State of California, Department of Transportation, Legal Division since 1971.

3. I am the attorney asigned to review and approve allocations from grade separation funds for the Depart-

ment of Transportation (hereinafter referred to as the department).

4. I have been associated with the grade separation program since 1977.

5. On April 30, 1980, per my instruction Mr. H. Frank Hiyama on behalf of the department notified the City of Salinas (hereinafter referred to as city) that its application for funds must be denied.

6. On June 3, 1980, the Public Utilities Commission (hereinafter referred to as commission) issued decision No. 91891 denying Southern Pacific Transportation Company's (hereinafter referred to as S.P.) application for rehearing and granted the city's application for modification of decision No. 91469.

7. Based on the commission's decision No. 91891 the department reviewed the city's application filed March 24, 1980, and determined that the city had complied with all the provisions of section 1550 et seq. of Title 21 of the California Administrative Code.

8. On June 4, 1980, I as the attorney for the department advised the city and S.P. that the city's application of March 24, 1980, was in total compliance and that the department intended to make an allocation of $5,000,000 from the 1979-80 Grade Separation Fund to the city on or before June 10, 1980.

9. As of June 10, 1980, the entire Grade Separation Fund for the 1979-80 fiscal year has been allocated.

10. The department's allocation to the city for the Davis Road grade separation project encumbered the funds for the 1979-80 fiscal year; this avoided said funds from reverting to the General Fund on June 30, 1980, by operation of law. In addition, these funds have been included in the 1980-81 proposed State Budget Bill for reappropriation

for expenditure by the department in the 1980-81 fiscal year. Therefore, if this budget item is not deleted from the proposed State Budget Bill, and I have no reason to believe that it will, then the funds will be available for reallocation during the 1980-81 fiscal year, if a court of competent jurisdiction determines that the city is not entitled to the currently allocated funds. Then the funds could be reallocated to the next eligible applicant on the 1979-80 priority list, which is the Hollywood Way project in the City of Burbank.

11. On June 11 and 12, 1980, I notified, Ann F. Hasse and Harold S. Lentz, attorneys for S.P. by telephone of the action of the department, regarding the allocation to the city and its subsequent effect on the Grade Separation Fund, which is set forth in detail in paragraph 10 of this declaration.

12. It was further explained to the attorneys for S.P., Ann Hasse and Harold S. Lentz, that I cannot bind the Legislature, and if for whatever reason reappropriation of the Grade Separation Fund is deleted from the State Budget Bill then the city would be the only applicant who could receive the funds. However, it is my best information and belief that the funds will not be deleted from the State Budget Bill.

I declare under penalty of prejury that the foregoing is true and correct.

Executed this 13th day of June 1980, at Sacramento, California.

/s/ Eugene C. Bonnstetter
Eugene C. Bonnstetter
Declarant